Supreme Court, U.S.
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No. ____

In the Supreme Court of the United States

CRV ENTERPRISES, INC.,
and C. RYAN VOORHEES,
Petitioners,

v.

UNITED STATES,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), this Court repudiated the so-called Notice Rule, which held that post-enactment purchasers could not state a claim for a regulatory taking arising from restrictions adopted before they took title to the property. The Federal Circuit's decision in this case—like the Ninth Circuit's decision in *Guggenheim v. City of Goleta*, No. 10-1125 (Petition for Writ of Certiorari docketed Mar. 11, 2011)—effectively revives the Notice Rule, fragmenting the Circuits in their interpretation of *Palazzolo*. The specific aspect of the issue presented by this case is: Does a post-enactment purchaser have standing to bring a regulatory takings claim arising from the implementation of preexisting regulations, if the previous owner could not have ripened a takings claim when the regulations were enacted?

2. When the federal government physically deprives a littoral property owner of the long-established right to access navigable waters by placing a log boom in a waterway, does the government incur liability for a physical taking notwithstanding that (1) neither the boom nor its supporting pilings are situated on the littoral owner's land, and (2) the government has not appropriated or diverted any water from the waterway?

LIST OF ALL PARTIES

All parties to this proceeding are named in the caption of the case.

CORPORATE DISCLOSURE STATEMENT

CRV Enterprises, Inc., has no parent corporation and no publicly held company owns 10% or more of the corporation's stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioners CRV Enterprises, Inc. and C. Ryan Voorhees respectfully petition this Court for a Writ of Certiorari to review the judgment of the United States Circuit Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the Federal Circuit Court of Appeals is reported as *CRV Enterprises, Inc. and C. Ryan Voorhees v. United States*, 626 F.3d 1241 (Fed. Cir. 2010), and is reproduced at Appendix A to this Petition. The order of the United States Court of Federal Claims granting the United States' motion to dismiss is reported as *CRV Enterprises, Inc. and C. Ryan Voorhees v. United States*, 86 Fed. Cl. 758 (2009), and is reproduced at Appendix B to this petition. The Judgment of the Court of Federal Claims appears at Appendix C to this petition.

JURISDICTION

The district court had jurisdiction to review this case pursuant to 28 U.S.C. § 1331. The decision of the Federal Circuit Court of Appeals was entered on November 17, 2010. Petition Appendix (App.) A-1. On February 7, 2011, Chief Justice Roberts granted Petitioners' timely application to extend the time within which to file the petition to March 17, 2011. No. 10A771. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND REGULATORY PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part: "[P]rivate property [shall not] be taken for public use without just compensation."

The Record of Decision of the United States Environmental Protection Agency for the McCormick & Baxter Superfund Site, Stockton, California, dated March 31, 1999, is set forth in pertinent part at Appendix D to this Petition.

STATEMENT OF THE CASE

Under California law, the owner of littoral property has a right of access to navigable waters "from every part of his frontage across the foreshore." *Marks v. Whitney*, 491 P.2d 374, 382 (Cal. 1971). This case involves a Fifth Amendment taking of littoral access rights by the placement of a log boom across a navigable waterway, immediately adjacent to the littoral owner's property

The property in question was acquired in 2002 by Petitioner CRV Enterprises, Inc., a California real estate development firm. Two years later, the property was transferred to Petitioner C. Ryan Voorhees (Voorhees), who is the owner, director, president, and primary managing officer of CRV Enterprises, Inc. For purposes of this Petition, Voorhees and CRV Enterprises, Inc., will be referred to collectively as "CRV."

A. Factual Background

1. EPA Identifies a Superfund Site on the South Side of Old Mormon Slough and Proposes Remediation Measures

The Old Mormon Slough (Slough) is a strip of navigable water, approximately 180 feet wide and 2,500 feet long, connected to the Stockton Deep Water Channel (Channel) in Stockton, California. App. B-2. The Channel connects the Slough to the Port of Stockton and, via the San Joaquin River, ultimately provides access to San Francisco Bay. *Id.*

For several decades, the McCormick and Baxter Creosoting Company operated a wood treatment facility bordering the south bank of the Slough. App. A-4. These operations ended in 1990, and two years later the United States Environmental Protection Agency (EPA) designated the McCormick and Baxter property a Superfund cleanup site under the Comprehensive Environmental Response, Compensation and Liability Act of 1980. *Id.* EPA undertook a variety of activities to determine the extent of soil and water contamination attributable to the creosote operation, and to design appropriate remediation measures. *Id.* No significant contamination was found to affect properties on the north side of the Slough, and no remediation measures were designated for those properties. *Id.*

From 1992 through 1999, EPA evaluated the extent of contamination in and around the Superfund site, and implemented containment measures. *Id.* After considering a range of long-term remediation plans, in March of 1999, EPA issued a Record of

Decision (ROD) describing the selected remedies. Relevant portions of the ROD are reproduced at Petition App. D; the ROD may be viewed in its entirety at: http://yosemite.epa.gov/r9/sfund/r9sfdocw.nsf/3dc283e6c5d6056f88257426007417a2/2771f82db374386988257007006a2480!OpenDocument (last visited Mar. 7, 2011). The primary identified remedy called for capping the contaminated sediment at the bottom of the Slough under at least two feet of sand. App. D-11. The ROD also called for "institutional controls" to regulate access to the Slough to prevent disturbance of the sand cap. App. D-21. The institutional control measures to be implemented were unspecified, although the ROD noted that access to the Slough would be restricted by "warning signs or log booms[] and/or to the extent available, land use restrictions." App. D-10.

Although the ROD estimated the time required to design and implement the sediment cleanup remedies at seven to eight months, no measures to cap the Slough or restrict navigational access were undertaken over the next six years. App. D-28; App. B-7. In September of 2005, EPA announced significant modifications to the remediation measures proposed in the ROD, which were detailed in an Explanation of Significant Differences. Joint Appendix on Appeal, Vol. I at 359-60.

2. CRV Purchases Uncontaminated Property on the North Side of Old Mormon Slough for a Marina-Based Development

In August of 2000, CRV entered into an option to purchase a nine-acre tract (the marina site) on the northern bank of the Slough, across from the

Superfund parcel. App. A-5. The previous owner had dredged the Slough fronting the marina site and had installed improvements enabling the ongoing use of the property for commercial marine purposes. App. B-5. CRV planned to develop the tract further, in conjunction with two neighboring properties CRV already owned, for a marina and related commercial uses. CRV exercised its option to purchase the marina site in November of 2002. App. A-6. Both before and after the purchase, CRV met with EPA personnel to try and ensure that the Agency's implementation of remediation measures would not deprive the marina site of its littoral access rights. App. A-5-6.

3. EPA Places a Log Boom Across the Slough, Permanently Eliminating Access to Navigable Waters from Most of CRV's Marina Site

In the summer of 2006, EPA finally began implementing the ROD, capping a portion of the bottom of the Slough and driving two pilings near its mouth. App. A-6. A log boom was then strung between the pilings, permanently closing off the Slough to marine traffic. App. A-6-7. The placement of the boom foreclosed access to the Channel from most of the foreshore of CRV's property, rendering it useless for a marina-based development or for any other maritime use. App. A-7.

B. Judicial Proceedings

1. CRV Files a Takings Lawsuit in 2003, Which Is Dismissed as Unripe by Stipulation

Notwithstanding a series of meetings with EPA to seek a remediation plan that would preserve CRV's

littoral rights, by 2003 CRV became convinced that the Agency was determined to seal off the Slough near its mouth with a permanent log boom, foreclosing all future marine access. Based on this conviction, on April 30, 2003, CRV filed an inverse condemnation action against the Government in the Court of Federal Claims. App. B-7. The United States responded with a motion for judgment on the pleadings on the grounds that, inter alia, the takings claim was not ripe for adjudication since no denial of access from CRV's marina site to either the Slough or the Channel had in fact occurred. *Id.*

Given that EPA had taken no steps to implement the ROD, CRV and the Government filed a joint motion to stay proceedings on the grounds that the inverse condemnation claim would not ripen "unless and until the EPA undertakes activities that Plaintiff believes blocks its navigational access, in part or in whole, to the Old Mormon Slough and the Stockton Channel." App. A-6. When it became apparent that no implementation activity was imminent, and that CRV's access rights remained unimpaired, the parties subsequently stipulated to a dismissal without prejudice, which was entered on May 4, 2005. *Id.*

2. CRV's 2006 Takings Lawsuit Is Dismissed by the Court of Federal Claims

In September of 2006, following EPA's installation of the log boom across the Slough, CRV filed a second complaint in inverse condemnation, seeking just compensation for the taking of its property. App. B-7. The Court of Federal Claims dismissed the action, this time holding that CRV's regulatory takings claim was ripe for adjudication at the time of the issuance of the

1999 ROD, and that it was now barred by the six-year statute of limitations. App. B-23. Alternatively, the court held that CRV did not have standing to assert a regulatory takings claim because it did not purchase the property until after the ROD had issued. App. B-24. Finally, the court ruled that CRV had failed to state a claim for a physical taking, since the EPA's pilings and boom were situated in the Slough, not on CRV's land. App. B-12-13.

3. The Dismissal of CRV's Takings Claim Is Affirmed by the Federal Circuit

On appeal, the Federal Circuit Court of Appeals affirmed. The appellate panel correctly noted that "[r]iparian and littoral rights do not convey ownership to [*sic*] the water but only rights to use the water." App. A-9. The panel also recognized that "action not occurring on a plaintiff's land can still lead to a physical taking of water rights." *Id.* Yet instead of pursuing this logic to its natural conclusion, by determining whether EPA's actions had physically deprived CRV of its littoral rights to access navigable waters, the court below leaped to the unprecedented conclusion that there can be no physical taking of water rights unless the water itself has been seized or diverted. App. A-11-13.

With respect to CRV's regulatory takings claim, the Federal Circuit did not reach the trial court's holding that the action was time-barred. App. A-14. Instead, the appellate panel found that CRV lacked standing to bring the claim, since it did not acquire the marina site until after EPA had issued its 1999 ROD. *Id.* Unlike the Court of Federal Claims, the court below recognized that such a holding clearly implicates

the doctrine of *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), in which this Court held that a regulatory takings claim cannot be extinguished by the mere transfer of title to regulated property.

The only basis upon which the court below could distinguish its holding from the contrary rule of *Palazzolo* was to declare that the vaguely specified, disjunctive guidelines of the ROD itself comprised a final agency decision as to precisely how EPA's remediation measures would impact CRV's property. App. A-15. The Federal Circuit did not address this Court's standard for evaluating administrative finality, that the agency must have no further discretion over how the regulations shall be applied, or how that standard could be satisfied by the language of the ROD itself and the Agency's subsequent adoption of the 2005 Explanation of Significant Differences. The effect of the decision was simply to reiterate the discredited holding of the Rhode Island Supreme Court in *Palazzolo*—that once restrictions on the use of property are adopted, they become background principles of law that cannot be challenged by a subsequent purchaser of regulated property.

CRV timely files this petition for certiorari.

REASONS FOR GRANTING THE PETITION

This Court should grant the petition for certiorari and either summarily reverse, grant and hold pending the Court's disposition of *Guggenheim v. City of Goleta*, No. 10-1125 (Petition for Writ of Certiorari docketed Mar. 11, 2011), or schedule the case for full briefing

and argument. On two important questions of takings law, the decision of the court below is inconsistent with the decisions of this Court and the decisions of other Circuits. Uniformity in the application of the Takings Clause by the federal judiciary can only be achieved if these conflicts are resolved by this Court.

I

THE FEDERAL CIRCUIT HAS JOINED THE NINTH CIRCUIT IN CIRCUMVENTING THIS COURT'S HOLDING IN *PALAZZOLO v. RHODE ISLAND*, ADDING TO THE FRAGMENTATION OF THE CIRCUITS ON WHETHER THE RIGHT TO BRING A FIFTH AMENDMENT TAKINGS CHALLENGE CAN SURVIVE A CONVEYANCE OF THE REGULATED PROPERTY

A. *Palazzolo* Established That Takings Claims Survive a Transfer of Ownership After the Adoption of Measures To Restrict the Use of Property

In *Palazzolo v. Rhode Island*, this Court was asked to determine whether a property owner "deemed to have notice of an earlier-enacted restriction . . . is barred from claiming that it effects a taking." 533 U.S. at 626. The case was thought to be the culmination of a judicial trend that gained momentum throughout the 1990s, whereby takings claims were summarily dismissed under the so-called "Notice Rule": when the title to property changes hands, the new owner is deemed to have purchased with notice of all existing

land-use regulations, and is forever barred from challenging them as violating the Takings Clause. *Id.* at 613.

This rule was applied by the Rhode Island Supreme Court when Anthony Palazzolo sued for a taking, based on the denial of his application to develop wetlands on his property. The state court held that, because restrictive wetlands regulations had been adopted before Palazzolo acquired title to the parcel, he was precluded from bringing a takings claim based on the impact of the regulations on his land:

"Here, when Palazzolo became the owner of this land in 1978, state laws and regulations already substantially limited his right to fill wetlands. Hence, the right to fill wetlands was not part of the title he acquired." *Palazzolo v. Rhode Island*, 746 A.2d 707, 716 (R.I. 2000). A claim for a taking, under this doctrine, could be stated only by the owner of record at the time restrictive measures are adopted. Any subsequent transfer of title forever extinguishes any possibility of bringing such a claim, since "all subsequent owners take the land subject to the pre-existing limitations and without the compensation owed to the original affected owner." *Id.* at 716-17.

Reversing the Rhode Island Supreme Court in *Palazzolo*, this Court flatly rejected the Notice Rule. A doctrine that bars post-enactment buyers from challenging regulations under the Takings Clause would impermissibly allow the State to "shape and define property rights . . . and subsequent owners cannot claim any injury from lost value." 533 U.S. at 626. Writing for the majority, Justice Kennedy observed that such a rule

> would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule.

Id. at 627.

Unfortunately, the attractiveness of the Notice Rule to courts seeking a quick and clean way to resolve takings claims in favor of the government has proven stronger than the force of its repudiation in *Palazzolo*. Many lower courts, both state and federal, have continued to apply the Notice Rule de facto, routinely barring subsequent purchasers from asserting regulatory takings claims under a wide variety of pretexts. *See* J. David Breemer & R. S. Radford, *The (Less) Murky Doctrine of Investment-Backed Expectations After* Palazzolo *and* Tahoe-Sierra *and the Lower Courts' Disturbing Insistence on Wallowing in the Pre-*Palazzolo *Muck*, 34 Sw. U.L. Rev. 351, 402-17 (2005). The case at bar exemplifies such an exercise in judicial ingenuity.

B. This Case, like *Guggenheim v. City of Goleta*, Exemplifies the Extreme Lengths to Which Some Circuit Courts of Appeals Have Gone To Avoid Complying with This Court's Teaching in *Palazzolo*

1. The Court Below Invoked an Illusory "Ripeness" Issue To Bar CRV, as a Post-Enactment Purchaser, from Asserting a Regulatory Takings Claim

In a prescient passage headed "Interaction with Ripeness Principles," written shortly after *Palazzolo* was handed down, Professor Eagle noted: "It might be tempting for a reviewing court otherwise inclined to find for the government in a takings case to . . . [foreclose a claim brought by a subsequent buyer] by asserting that the burden of a regulation inures only against the owner at the time it was promulgated." Steven J. Eagle, *The Regulatory Takings Notice Rule*, 24 Haw. L. Rev. 533, 576 (2002).

That is precisely what the Federal Circuit asserted in the case at bar. Despite the stipulation of the parties to the contrary, the court below held that CRV's regulatory taking claim had ripened upon EPA's adoption of the ROD, with its references to future "institutional controls," in March of 1999. App. A-16. CRV's acquisition of the parcel then permanently extinguished any property rights that might one day be abrogated by implementation of the ROD. App. A-17.

However, as Prof. Eagle went on to observe: "It would be illogical, and unfair, to bar a regulatory takings claim because of the post-enactment transfer

of ownership where the steps necessary to make the claim ripe were not taken, or could not have been taken, by a previous owner." Eagle, *Notice Rule* at 576. In particular, he pointed to "the Court's Byzantine Williamson County ripeness rules," which often make it exceedingly difficult for a landowner to demonstrate that a takings claim is ripe for adjudication against the government. *Id.* at 577. If the court below had applied these same stringent ripeness requirements, it would have been obvious that no regulatory takings claim could have been asserted against EPA in 1999.

EPA's mere issuance of the ROD plainly failed to meet the requirements for stating a claim for either a facial or an as-applied taking. A facial takings claim must allege that "no set of circumstances exists" under which the regulation could be implemented without violating the Constitution. *United States v. Salerno*, 481 U.S. 739, 745 (1987). The ROD's repeated references to "institutional controls," and to restricting access by means of "warning signs or log booms[] and/or . . . land use restrictions," App. D-10, could not possibly satisfy this criterion, due to the wide range of implementation options left open by the plain language of the document.

Similarly, under *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 200 (1985), an as-applied takings claim does not ripen until "a final decision is made as to how the regulations will be applied to [the plaintiff's] property." For such a final decision to exist in this case, it must be shown that the Agency had no further discretion over the extent to which the regulations will interfere with the use of CRV's property. *Suitum v.*

Tahoe Reg'l Planning Agency, 520 U.S. 725, 739 (1997). As the Federal Circuit itself has noted, outside the context of a post-enactment purchaser: "To allow a claim to ripen on the assertion that the exercise of an agency's discretion would have a certain result, without permitting the agency to exercise that discretion would offend the requirement from *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967), that the issue be fit for review." *Morris v. United States*, 392 F.3d 1372, 1377 (Fed. Cir. 2004).

Here, the range of choices expressly left open under the ROD, together with the Agency's subsequent implementation of measures that significantly differed from the provisions of the ROD, leave no possible basis for alleging that EPA's discretion over the choice of remediation measures came to an end in March of 1999. Because CRV's predecessor in interest could not have stated a ripe takings claim against the Agency based upon the mere issuance of the ROD in 1999, it is clear that CRV's regulatory takings claim was dismissed solely because CRV "did not own the property when EPA issued its ROD," App. A-14, in plain conflict with this Court's holding in *Palazzolo*.

2. While the Federal Circuit Was Invoking an Illusory "Ripeness" To Foreclose a Takings Claim by a Post-Enactment Purchaser, the Ninth Circuit Was Doing the Same by Limiting *Palazzolo* to Its Facts

The fragmentation of the Circuit Courts of Appeals over the application of *Palazzolo* is illustrated by another petition for certiorari currently pending before this Court, in *Guggenheim v. City of Goleta*. *Guggenheim* involves a challenge to a regulatory

wealth transfer effected by a mobile home park rent control ordinance. *Guggenheim v. City of Goleta*, No. 06-56306, 2010 U.S. App. LEXIS 25981 (9th Cir. 2010). The property was already subject to rent control under a Santa Barbara County ordinance at the time the petitioner purchased it. *Id.* at *7. An *en banc* panel of the Ninth Circuit found that fact to be dispositive, holding that a subsequent purchaser could have no expectation that a successor ordinance imposed by the City of Goleta could be struck down as an unconstitutional taking. *Id.* at *23-*24.

Like the court below, the *en banc* panel in *Guggenheim* recognized the tension between its ruling and the teaching of this Court in *Palazzolo*. In order to uphold the City of Goleta's wealth transfer, the Ninth Circuit effectively limited *Palazzolo* to its facts:

> [E]ven though in *Palazzolo* title passed to the plaintiff after the land use restriction was enacted, he acquired his economic interest as a 100% shareholder in the corporation owning the land before the land use restriction was enacted, and title shifted to him because his corporation was dissolved, not because he bought the property.

Id. at *18. As Judge Bea pointed out in dissent, this and other superficial distinctions cited by the *Guggenheim* majority to justify its circumvention of *Palazzolo* "are mere differences, no more significant than that the Palazzolo land was in Rhode Island and the Guggenheim land was in California." *Id.* at *48-*49 (Bea, J., dissenting).

Had it wished to do so, the Ninth Circuit panel in *Guggenheim* could equally well have opted for the same rationale as the Federal Circuit in the case at bar. The Santa Barbara County rent control ordinance was enacted in 1979, and clearly purported to restrict the rents that could be charged in the Ranch Mobile Estates mobile home park, which was subsequently purchased by Guggenheim. *Id.* at *3-*7. Because Guggenheim's predecessor in interest did not file suit to challenge the ordinance as a taking at its inception, the Ninth Circuit panel could have held that the Assignment of Claims Act barred any subsequent purchaser from filing such a challenge—as was in fact held by the court below in the present case. App. A-14, n.7. Alternatively, the court below could equally well have sought to distinguish *Palazzolo* on its facts, since CRV, like Guggenheim, acquired the property at issue by purchase, rather than by operation of law. The only legally significant distinction between the case at bar and *Guggenheim* is the specific pretext by which the respective Court of Appeals sought to avoid applying this Court's holding in *Palazzolo*.

This Court should grant the Petition for Writ of Certiorari to restore uniformity among the Circuits in the treatment of regulatory takings claims brought by plaintiffs who purchase property subject to restrictive regulations.

II

CERTIORARI SHOULD BE GRANTED TO ESTABLISH UNIFORMITY AMONG THE CIRCUITS IN THE INTERPRETATION AND APPLICATION OF THIS COURT'S PHYSICAL TAKINGS DOCTRINE

A. Certiorari Should Be Granted Because the Federal Circuit's Decision Contravenes This Court's Long-Standing Physical Takings Doctrine and Conflicts With a Long Line of Authority in the Lower Courts

1. The Federal Circuit's Holding on the Physical Taking Issue Conflicts With the Settled Doctrine of This Court

The Federal Circuit's decision below holds that—absent actual diversion or depletion of a waterway—a private right of access to navigable waters is protected under the physical takings doctrine only if the government places an obstruction on the plaintiff's land. App. A-9-11. This holding is in direct conflict with the long-standing precedent of this Court, that the government incurs takings liability for the physical obstruction of a private right of access, regardless of the placement of the obstruction.

This Court has long recognized that the abrogation of private property rights by physical means gives rise to liability for just compensation under the Takings Clause. *See United States v. Causby*, 328 U.S. 256, 264 (1946) ("[T]he flight of airplanes, which skim the surface but do not touch it, is as much an appropriation of the use of the land as a more conventional entry

upon it."); *Portsmouth Harbor Land and Hotel Co. v. United States*, 260 U.S. 327, 330 (1922) (discharging artillery over petitioner's land can result in takings liability). This rule applies whenever property rights are abrogated by means of a physical instrumentality, regardless of whether the government actually invades the boundaries of a landowner's real property. *See Causby*, 328 U.S. at 265 (stating that it was "irrelevant" whether the government actually entered plaintiffs' property, because flights above the property had interfered with its use); *see also United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 754 (1950) (recognizing a right to compensation for loss of water rights resulting from government actions occurring beyond the perimeters of claimant's real property). The rule applies with equal force when access easements are taken by physical means. *United States v. Welch*, 217 U.S. 333, 339 (1910).

In *Welch*, this Court held that a takings claim must be recognized when the government acts to physically impede an access easement across the property of another. *Id.* In that case the government was held to have taken the petitioner's access easement by the construction of a dam on a river some distance away, because the dam raised the waters of a tributary creek, inundating a neighboring property and thereby terminating the petitioner's use of the easement. *Id.* Similarly, in *United States v. Cress*, 243 U.S. 316 (1917), this Court illustrated the far-reaching application of the physical takings doctrine in holding that the government incurs takings liability when it acts to physically obstruct a waterway in a manner that abrogates the state-recognized littoral rights of private property owners. In that case, a physical obstruction—placed wholly within the

waters of the United States—effected a taking because it slowed the current of a stream, so as to terminate a littoral landowner's right, under Kentucky law, to use the current to power his mill. *Id.* at 330.

In the case at bar, the Federal Circuit correctly recognized that CRV has the right under California law, as a littoral owner, to access the navigable waters of the San Joaquin River from every inch of its shoreline. App. A-3-4. However, the court below went on to hold that there was no physical taking because EPA had not appropriated or removed the waters of the Slough, but had merely abrogated CRV's right of access by placing a physical obstruction in the Slough. App. A-11-13. This ruling has no basis in law and plainly conflicts with the aforementioned decisions of this Court, and merits review for that reason alone.

2. The Federal Circuit's Holding on the Physical Taking Issue Is Inconsistent With the Third Circuit and Conflicts With Decisions of Other Federal Courts

Not only does the opinion below contravene *Cress* and *Welch*, it stands in direct conflict with a line of cases adhering to the rule that government actors are liable for physical obstructions to access rights. *See United States v. Smith*, 307 F.2d 49, 57 (5th Cir. 1962) (In stressing that this is a long-standing rule, the Fifth Circuit noted that the *Welch* case, underlying its decision, "[had] been cited without question in sixty cases, twenty-one of which were by the Supreme Court." *Id.* at 54.).

Most notably, the Federal Circuit's decision is patently inconsistent with the Third Circuit's holding that the government incurs takings liability for physically obstructing a private owner's right of access to navigable waters. *United States v. 50 Foot Right of Way*, 337 F.2d 956, 960 (1964). In *50 Foot Right of Way* the federal government installed a large pipe along the bed of the Newark Bay in New Jersey. In doing so, the government obstructed a littoral landowner's right to access the navigable waters of the bay. The Third Circuit held that just compensation was owed for a physical taking by virtue of the simple fact that, in obstructing access to navigable waters, the government had effectively destroyed a compensable property right. *Id.*

The conflict between the Third and Federal Circuits on this issue could not be more clear. Nevertheless, in the opinion below, the Federal Circuit purported to distinguish *50 Foot Right of Way* on the ground that, under New Jersey law, the claimant in that case also owned the bed of the waterway upon which the pipe was installed. App. A-9 n.5. The Third Circuit, however, made it clear that the owner was to be compensated for two separate constitutional violations—the pipe's physical occupation of the bed of the waterway and, independently, the obstruction of the owner's access to navigable waters. *50 Foot Right of Way*, 337 F.2d at 960. The holding of the Federal Circuit below, that physical obstruction of access is not compensable unless it is accompanied by a permanent physical occupation of the claimant's land, finds no support in *50 Foot Right of Way*.

The Federal Circuit's conclusion that interference with a state-recognized right of access is

non-compensable if the source of the obstruction does not rest upon private land conflicts with a long line of cases recognizing that the loss of a private right of access comprises an independent basis for compensation. *See United States v. Grizzard*, 219 U.S. 180, 185-86 (1911) (the value of a right of access to a public road was held to be compensable once obstructed, independent of any compensation owed for flooding the claimant's land); *see also Schiefelbein v. United States*, 124 F.2d 945, 946 (8th Cir. 1942) (recognizing a physical takings claim for the obstruction of a private right of access, despite the fact that "[n]o part of the [claimant's] tract . . . was taken or touched by the taking"). Given that the Federal Circuit's decision below contravenes these precedents, and splinters authority among the Circuits applying the physical takings doctrine, this Court should grant certiorari to resolve these conflicts and to clarify the doctrine.

B. Certiorari Should Be Granted Because of the Unusual Nationwide Importance of Ensuring That the Federal Circuit Does Not Depart from the Other Circuit Courts of Appeals in Its Interpretation and Application of This Court's Physical Takings Doctrine

The Federal Circuit's departure from the existing precedent of this Court and other Circuits is of particular importance because "the law of inverse condemnation [is] primarily developed in the [Federal Circuit]." *Lenoir v. Porters Creek Watershed Dist.*, 586 F.2d 1081, 1094 (6th Cir. 1978). This is because of the Circuit's unique role in reviewing appeals from the Court of Federal Claims, which in turn has exclusive

jurisdiction to adjudicate takings claims against the United States for money damages brought under the Tucker Act, 28 U.S.C. § 1491(a)(1). As such, the Federal Circuit's decision in this case will have precedential effect upon almost all takings claims brought against the United States.

The departure of the opinion below from the physical takings jurisprudence of this Court and other Circuits will create grave uncertainty and confusion in the standards for establishing takings liability against the federal government. It could also result in one standard of liability under the Fifth Amendment being applied to the federal government by the Federal Circuit, and a completely different and inconsistent standard being applied to other governmental entities in the other Circuits. Accordingly, it is of unusual nationwide importance to dispel the cloud of doctrinal confusion that the decision below has cast over the physical takings doctrine. *See Causby*, 328 U.S. at 258 ("[W]e granted certiorari because of the importance of the question presented."); *see also Kaiser Aetna v. United States*, 444 U.S. 164, 166 (1979) (granting certiorari because of the importance of understanding the scope of federal liability for physical takings in the navigable waters of the United States).

Only this Court can establish much-needed consistency among the Circuits on the scope and application of the physical takings doctrine, and assure uniform treatment of takings claims brought against the United States and other governmental entities.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

DATED: March, 2011.

Respectfully submitted,

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Appendix A–1

United States Court of Appeals

for the Federal Circuit

CRV ENTERPRISES, INC. AND

C. RYAN VOORHEES,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

2009-5100

Appeal from the United States Court of Federal Claims in case no. 06-CV-660, Judge Susan G. Braden.

Decided: November 17, 2010

JOHN H. PATTON, Patton Martin & Sullivan LLP, of Pleasanton, California, argued for plaintiffs-appellants.

AARON P. AVILA, Attorney, Environment and Natural Resources Division, United States Department of Justice, of Washington, DC, for defendant-appellee. With him on the brief was IGNACIA S. MORENO, Assistant Attorney General.

Before RADER, Chief Judge, LINN, and DYK, *Circuit Judges*.

DYK, *Circuit Judge*.

CRV Enterprises, Inc. and C. Ryan Voorhees ("plaintiffs") filed a claim against the United States in the Court of Federal Claims ("Claims Court"), alleging that the United States had taken plaintiffs' private property without just compensation by erecting a log boom that prevented plaintiffs from utilizing a slough adjacent to their property. The Claims Court held that plaintiffs failed to state a physical takings claim and that any regulatory takings claim was barred by the statute of limitations. *CRV Enters., Inc. v. United States*, 86 Fed. Cl. 758, 764-69 (2009). Alternatively, the court held that plaintiffs had no standing to assert a regulatory takings claim because they did not own the property when the regulatory takings claim accrued. *Id.* at 770. We agree that plaintiffs did not state a physical takings claim and that their regulatory takings claim was barred because they did not own the property at the time of the governmental action. Accordingly, we affirm.

Appendix A–3

BACKGROUND

The following are either facts alleged in the complaint or established by state law. The property is a nine acre piece of land, located on the northern shore of the Old Mormon Slough ("Slough"). The Slough is a man-made waterway in Stockton, California connected to the Stockton Deep Water Channel, which in turn flows into the San Joaquin River and then the San Francisco Bay. As landowners adjacent to the Slough, plaintiffs are riparian property owners under California law and have a "riparian right of access to the navigable part of waters." *See id.* at 765 (citing *Petroleum & Mining Co.*, 77 P. 823, 824 (Cal. 1904)).[1]

In general, riparian rights include the right "(i) of access to the water; (ii) to build a wharf or pier into the water, (iii) to use the water without transforming it, (iv) to consume the water, [and] (v) to accretions."[2] Robert E. Beck, *Waters & Water Rights* § 6.01(a) (3d ed. 2009). The right to access "means the right of ingress and egress to one's land by way of the water, or to the water from the land." *Id.* § 6.01(a)(1). Plaintiffs also assert littoral rights, which historically applied only to landowners adjacent to lakes but, more recently, have frequently been seen as indistinguishable from riparian rights. *See id.* § 6.02(b). According to California law, littoral rights

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[1] For convenience, at places in this opinion we treat CRV and Voorhees as joint owners of the property. In fact, as described below, CRV transferred the property to Voorhees in 2004.

[2] Accretion is "the slow, virtually imperceptible, build up of alluvium along the bank of a waterbody" that essentially adds new land to the shoreline. Robert E. Beck, *Waters & Water Rights* § 6.01(a)(5) (3d ed. 2009).

protect "a right to build a pier out to the line of navigability; a right to accretion; a right to navigation (the latter right being held in common with the general public) . . . ; and a right of access from every part of his frontage across the foreshore."[3] *Marks v. Whitney*, 491 P.2d 374, 382 (Cal. 1971) (in bank).

Before plaintiffs acquired the property in 2002, between 1942 and 1990, wood-preserving operations at the McCormick and Baxter Creosoting Company ("McCormick and Baxter"), located on the southern shore of the Slough across from plaintiffs' property, resulted in the release of hazardous chemicals, including carcinogens, into the soil, Slough, and sediment at the bottom of the Slough. As a result, in 1992, the Environmental Protection Agency ("EPA") added the McCormick and Baxter site to its Superfund National Priorities List. The Superfund site included the contaminated sediment in the Slough. After studying the extent of the contamination of the Slough, EPA determined it posed unacceptable risks to humans and fish. It then, in March 1993, issued a draft report evaluating different remedial alternatives, including "Alternative SD-2," which involved installation of a two-foot thick sand cap over three-fourths of the Slough's bed and "institutional controls" to prevent navigation and dredging in the capped portion of the Slough that would expose the contaminated sediment. The final report, issued in January 1999, reiterated

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[3] Littoral means "of or relating to the coast or shore of an ocean, sea, or lake." *Black's Law Dictionary* 952 (8th ed. 2004). Because the Slough is a man-made body of water, the Claims Court noted that plaintiffs arguably have no littoral rights. *CRV Enterprises*, 86 Fed. Cl. at 765 n.5. However, it proceeded with its analysis under the assumption that plaintiffs had littoral rights, and we do the same.

that, under "Alternative SD-2," "institutional controls would be implemented for the capped portion of [the Slough]." J.A. 731. Both the draft report and the final report defined "institutional controls" in a prior section, which explained that "institutional controls . . . include[d] the installation of a log boom." J.A. 595, 725. In fact, the final report included a diagram of "Alternative SD-2," which explicitly marked the site of the log boom. J.A. 740.[4] In March 1999, EPA finally issued its Record of Decision ("ROD"). The ROD explicitly adopted "Alternative SD-2" from the final report and provided for the sand cap and "institutional controls to limit navigational access," i.e., the log boom. J.A. 830-31.

During the time that EPA was determining the necessary steps, Bill Dutra ("Dutra") owned the property, situated across the Slough from the McCormick and Baxter site. The EPA's installation of the log boom threatened to deprive Dutra of use of the portion of the Slough located behind the log boom. In October 1999, Dutra objected to the EPA's action and submitted an alternative proposal, which the EPA rejected on November 20, 2000. In August 2000, after the issuance of the ROD, CRV signed an option agreement with Dutra to acquire the property. CRV, which owned other land adjacent to the property, hoped to develop the property as "part of a mixed use master plan development" that included a marina, boat slips, dry boat storage facilities, marine sales and service facilities, restaurants, and lodging. J.A. 102-03. In November 2001 and August 2002, Dutra and

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[4] See the appendix to this opinion for a map of the Slough area after the erection of the log boom, J.A. 1337, and the diagram in EPA's final report, J.A. 740.

Voorhees both met with EPA to discuss the remediation plans, and EPA reiterated that its plan included installing a sand cap on three-fourths of the Slough and placing a log boom across the Slough to block boat traffic. As a result, CRV and Dutra entered into an amended option agreement in October 2002, acknowledging Dutra had failed to reach a "mutually acceptable agreement" with EPA. J.A. 946. Finally, in November 2002, CRV exercised its option and acquired the property from Dutra, who also assigned his rights to CRV. The property was transferred to Voorhees on October 20, 2004.

CRV filed an inverse condemnation claim against the United States on April 30, 2003 ("the CRV I case"), alleging that EPA's planned implementation of the remediation project was a taking. The United States, denying a taking had occurred, also argued CRV's takings claim was not ripe because the remedy had not yet been implemented. When work on the remedy was delayed for over a year, CRV and the United States filed a Stipulation for Dismissal without prejudice, agreeing the claim was not yet ripe. The joint motion stated that "CRV acknowledges (and Defendant concurs) that unless and until the EPA undertakes activities that Plaintiff believes blocks its navigational access, in part or in whole, to the Old Mormon Slough and the Stockton Channel, Plaintiff's claims as pled in this action are not ripe." J.A. at 1141.

In September 2006, EPA finally completed installation of the sand cap and log boom. The log boom was erected by driving two pilings into the bed of the Slough and then stringing the boom between the pilings; the plaintiffs do not own the Slough bed or the water, and the boom does not touch the property. Also,

plaintiffs retained the ability to access the uncapped portion of the Slough from the property, as about forty percent of its shoreline touched the uncapped portion and allowed free access into the adjacent Stockton Water Channel. The log boom did, however, prevent plaintiffs from navigating from the uncapped portion of the Slough to their shoreline behind the boom or from the portion of the Slough behind the boom into the uncapped part of the Slough and the Deep Water Channel beyond. EPA also posted a warning sign, affixed to one of the log boom pilings and facing out toward the mouth of the Slough, stating "DANGER NO ENTRY—Capped Sedimants (sic) Beyond this Point— Hazardous Materials." J.A. 375, 410.

On September 19, 2006, plaintiffs filed suit against the United States in the Claims Court, alleging that the installation of the log boom constituted a Fifth Amendment taking. The Claims Court dismissed plaintiffs' complaint, finding that the plaintiffs alleged no physical taking. It also held that any potential regulatory takings claims were barred by the statute of limitations, which, according to the Claims Court, began running with EPA's issuance of the ROD on March 31, 1999, or, alternatively, that plaintiffs had failed to establish standing because they did not own the property when the ROD was issued.

Plaintiffs timely appealed, and we have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3). We review de novo the Claims Court's decision to dismiss. *Banks v. United States*, 314 F.3d 1304, 1307-08 (Fed. Cir. 2003).

DISCUSSION

I

Plaintiffs' primary contention is that EPA's installation of the log boom is a physical taking. Decisions of the Supreme Court have drawn a clear line between physical and regulatory takings. The former involve a physical occupation or destruction of property, while the latter involve restrictions on the use of the property. *Compare Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (finding a permanent physical invasion where state required owners to allow cable lines to be placed on their buildings), *and United States v. Pewee Coal Co.*, 341 U.S. 114 (1951) (finding a physical taking where government took control of mine by requiring officials to "conduct operations as agents for the Government"), *with Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978) (finding no physical taking where regulation restricted owner's use of the airspace above his building), *United States v. Cent. Eureka Mining Co.*, 357 U.S. 155 (1958) (finding no physical taking where government ordered gold mine to stop operations temporarily), *and Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987) (finding no physical taking where government required half of the coal beneath certain structures to be kept in place).

The distinction is important because physical takings constitute per se takings and impose a "categorical duty" on the government to compensate the owner, whereas regulatory takings generally require balancing and "complex factual assessments," utilizing the so-called *Penn Central* test. *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322-23 (2002) (internal quotations omitted). If the

alleged taking is a physical taking, "no matter how minute the intrusion, and no matter how weighty the public purpose behind it, [the Supreme Court has] required compensation." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992).

Here, there has been no physical invasion of the plaintiffs' land. The log boom is anchored to the bottom of the Slough. Plaintiffs do not contend that they own the bed of the Slough.[5] Nor do the plaintiffs claim that they own the water itself. In fact, plaintiffs admit they do "not assert that [they] owned the [Slough], the waters within it, or the Slough's bed." Appellant's Reply Br. 8. Riparian and littoral rights do not convey ownership to the water but only rights to use the water. *See United States v. State Water Res. Control Bd.*, 227 Cal. Rptr. 161, 167-68 (Cal. Ct. App. 1986) ("[W]hat is meant by a water right is the right to use the water."). Plaintiffs admit that "[t]he riparian owner, of course, does not own title to the waters (the State does, in public trust), but rather the rights to use it." Appellant's Br. 26. However, plaintiffs assert that the United States, by restricting their right to use the Slough, has physically taken their riparian and littoral rights to access.

Plaintiffs are correct that action not occurring on a plaintiff's land can still lead to a physical taking of water rights. As the Supreme Court noted in *Dugan v. Rank*, 372 U.S. 609, 625 (1963), "[a] seizure of water rights need not necessarily be a physical invasion of land." For example, the Supreme Court and this court

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[5] *Compare United States v. 50 Foot Right of Way of Servitude In, Over and Across Certain Land in the City of Bayonne*, 337 F.2d 956, 958 (3d Cir. 1964) (plaintiff owned the submerged land over which a pipeline was laid).

have found a physical taking of riparian water rights when water in which the plaintiff held use rights was permanently removed. *See id.*; *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 752-53 (1950); *Casitas*, 543 F.3d at 1289-96. However, these cases do not hold that a physical taking of water rights occurs merely when a particular use of the water is restricted.

For example, both *Gerlach* and *Dugan* involved the construction of the Friant Dam in California, which "diverted [water from the San Joaquin River] through a system of canals . . . to irrigate more than a million acres of land, some as far as 160 miles away." *Gerlach*, 339 U.S. at 729; *see Dugan*, 372 U.S. at 612-14. In *Gerlach*, the diversion left a virtually "dry river bed . . . below the dam" and ended the "natural seasonal overflow" of the San Joaquin River onto the plaintiffs' lands, to which the plaintiffs held private riparian rights. 339 U.S. at 729-30. The Court analyzed this deprivation as a physical taking, characterizing the action as an "expropriation" that "destroyed and confiscated a recognized . . . property right." *Id.* at 752-53. Similarly, in *Dugan*, landowners having riparian rights to the San Joaquin River downstream from the dam, alleged that insufficient water remained to satisfy their rights. 372 U.S. at 614-16. The Court held this physical removal of the water was a partial physical taking. *Id.* at 620, 625.

In *Casitas*, this court held that a government-mandated fish ladder that would "divert water from [the plaintiff's property], resulting in a permanent loss . . . of a certain amount of water per year" should be analyzed as a physical taking. 543 F.3d at 1282, 1289, 1296. Casitas owned a water project that provided a county water supply and, by

contract with the government, owned "the perpetual right to use all water that becomes available through" the project. *Id.* at 1282. The fish ladder "physically diverted" wat r from the project, rendering the water "forever gone." *Id.* at 1291, 1296. The court compared this deprivation to the *Dugan* and *Gerlach* cases and contrasted it from cases where the use of natural resources was merely restricted. *Id.* at 1289-95.

Thus, the prior water rights cases finding a physical taking involved instances where the "United States physically diverted the water, or caused water to be diverted away from the plaintiffs' property" such that water was removed entirely and the plaintiffs "right to use that water, [was] forever gone." *Casitas*, 543 F.3d at 1290, 1296. Unlike *Casitas*, *Gerlach*, and *Dugan*, plaintiffs have not shown any physical appropriation of water or the actual removal of any amount of water. Here, all of the water remains in the Slough, and plaintiffs are still able to use it, even if not for the particular use of navigation that they desired. Plaintiffs' preferred use of its property, as a launch for navigation into the Slough, has not even been completely taken away. It is undisputed that about forty percent of its shoreline still touches the navigable portion of the Slough and provides access to the larger waterways beyond.

In similar circumstances, we have held that a government's action limiting the use of a plaintiff's water without physically removing the water is not a physical taking. *See Washoe Cnty v. United States*, 319 F.3d 1320, 1326 (Fed. Cir. 2003). In *Washoe*, the Department of the Interior denied a permit to build a pipeline from the water source (owned by Washoe County) over federal land. *Id.* at 1322-23. The county

argued that denial of the permit "ensured that their groundwater remained [in its original location]" and thus constituted a physical taking. *Id.* at 1325. We noted that the government "neither physically diverted or appropriated any water nor physically reduced the quantity of water that [was] available." *Id.* at 1327. We concluded the county "still retained the right to use the water" but simply could not use the water for its preferred purpose. *Id.* Under *Washoe*, even if the government's restriction on navigation in the capped portion of the Slough had completely deprived plaintiffs of their preferred use of the water, that fact alone would not make the government's action a physical taking. There must be a physical appropriation or destruction of the water, not just a restriction on the use of the water that remains in place.

If a mere use restriction that interferes with one of a property owner's rights were enough to support a compensable physical taking, almost every regulatory taking would be a physical taking. Plaintiffs appear to try to avoid this result by arguing that it is the "*physical* erection of the boom" as a "*physical* barrier" that constituted the taking in this case. *See* Appellant's Br. 30, 34 (emphasis added). However, the mere fact that the government's regulatory action included some sort of physical instrument does not change the fact that the government action merely restricted plaintiffs' use of its property and did not physically remove any of the water from the Slough.[6]

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[6] *See, e.g.*, *Warren v. City of Athens*, 411 F.3d 697, 705 (6th Cir. 2005). In *Warren*, the government blocked the drive-thru entrance to a Dairy Queen by erecting barriers "along," but not on,

(continued...)

Because plaintiffs cannot show that the government has physically appropriated its water rights by removing water entirely, we affirm the Claims Court's dismissal of plaintiffs' physical takings claim.

II

Although plaintiffs have no valid physical takings claim, they arguably asserted a regulatory takings claim in their complaint. Even assuming that such a claim was asserted, the Claims Court was correct to dismiss it. In dismissing the regulatory takings claim, the Claims Court relied upon its conclusion that the statute of limitations had run on the claim. Plaintiffs urge that, because of the government's position during the CRV I case that plaintiffs' claim was not ripe and the stipulation entered by both parties agreeing the claim was not ripe, the government is now judicially estopped to argue that the regulatory takings claim accrued before the log boom was installed. Judicial estoppel is an equitable doctrine, designed to "protect the integrity of the judicial process" by "prevent[ing] a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (internal quotations omitted). Under the doctrine, courts weigh whether (1) the supposedly contradictory positions are "clearly inconsistent," (2) the party succeeded in

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[6] (...continued)
the restaurant's property. *Id.* at 702. The barriers prevented customers from using the drive-thru and refuse trucks from removing trash from the back of the building. *Id.* The court stated that the plaintiffs did not raise a physical takings claim because they did not "contend[] that the City placed its barriers or otherwise physically encroached *on their property*." *Id.* at 705.

persuading the lower court of its earlier position, and (3) the party would derive an unfair advantage from the inconsistent advantage. *Id.* at 750. The government urges that judicial estoppel cannot apply to the United States and argues that, in any event, it has not taken inconsistent positions. We need not decide the issue because plaintiffs did not own the property at the time of the alleged regulatory taking and therefore lacked standing.

The Claims Court determined that plaintiffs could not raise a regulatory takings claim because they did not own the property when EPA issued its ROD and, hence, did not have a "valid property interest at the time of the taking." *CRV Enters.*, 86 Fed. Cl. at 770. It is well established that "only persons with a valid property interest at the time of the taking are entitled to compensation." *Wyatt v. United States*, 271 F.3d 1090, 1096 (Fed. Cir. 2001); *see also Huntleigh USA Corp. v. United States*, 525 F.3d 1370, 1377 (Fed. Cir. 2008); *Bair v. United States*, 515 F.3d 1323, 1327 (Fed. Cir. 2008); *Cienega Gardens v. United States*, 331 F.3d 1319, 1328 (Fed. Cir. 2003).[7] At oral argument CRV conceded that "if the regulatory taking occurred . . . before my clients acquired the property there would be a standing issue." Oral Arg. at 9:25-9:35, *available at* http://www.cafc.uscourts.gov. But plaintiffs maintain that the relevant government action here was not the ROD, which directed the destruction of use by the

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[7] Additionally, any attempted assignment of the takings claim by Dutra to plaintiffs would be ineffective because "[i]t is well established . . . that the Assignment of Claims Act prohibits the voluntary assignment of a compensation claim against the Government for the taking of property." *United States v. Dow*, 357 U.S. 17, 20 (1958); *see also* 31 U.S.C. § 3727(b).

installation of a log boom, but the actual installation of the log boom itself.

The Supreme Court has held that a takings claim does not accrue when Congress enacts an overall statutory scheme that authorizes the government action; instead the claim ripens when particular restrictions are actually imposed. *See Palazzolo v. Rhode Island*, 533 U.S. 610, 617, 620-21 (2000). In *Palazzolo*, the Court found the existence of background principles of state law, such as statutes and regulations granting general regulatory authority, did not deprive a later owner of the ability to sue for a regulatory takings claim when the authority was exercised. *Id.* at 628-30. In *Palazzolo*, the claim did not ripen when Rhode Island enacted legislation creating an agency "charged with the duty of protecting the state's coastal properties" or when "[r]egulations promulgated by the Council designated salt marshes like those on [the plaintiff's] property as protected 'coastal wetlands.'" *Id.* at 614. The claim did not ripen until after the plaintiff submitted development applications that were denied. *See id.* at 618-20. In determining ripeness, the Court stated the claim ripened when "the government entity charged with implementing the regulation has reached a final decision regarding the application of the regulations to the property at issue." *Id.* at 618 (quoting *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985)). Furthermore, the Court explained, once "the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened." *Id.* at 620.

Similarly, in *Goodrich v. United States*, 434 F.3d 1329, 1331-32 (Fed. Cir. 2006), it was alleged that the

regulatory taking claim accrued when the Forest Service implemented an ROD and permitted cattle to enter the plaintiff's grazing area. We held that the claim accrued when the ROD was issued, not when it was implemented. *Id.* We explained that "a claim accrues when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action" and when "the permanent nature of the government action is evident." *Id.* at 1333, 1336 (internal quotation omitted). We reasoned that an ROD was "sufficient to accrue a takings claim" because it is "clearly final." *Id.* at 1335. We further noted that it would be unfair to make property owners wait to sue until implementation of a regulation had occurred. *Id.* at 1336. In many cases, if plaintiffs were "required to wait until [implementation], it might be impractical, if not nearly impossible, to right the wrong." *Id.*

Under *Palazzolo* and *Goodrich*, CRV's regulatory takings claim accrued and ripened with the issuance of the ROD in March 1999. By that point, the government entity charged with implementing the Superfund program, EPA, had "reached a final decision regarding the application of the regulations to the property at issue," *Palazzolo*, 533 U.S. at 618, and "the permanent nature of the government action [was] evident," *Goodrich*, 434 F.3d at 1335. The EPA's ROD required the installation of a log boom. Although the implementation date remained in the future, the ROD represented EPA's final decision that it would install a log boom. At that point, it was clear the United States' action would be permanent. The final decision fixed "the permissible uses of the property . . . to a reasonable degree of certainty" because it became clear that the owner of the property would not be able to

freely navigate to and from the area behind the planned log boom. *See Palazzolo*, 533 U.S. at 620.

As such, the claim was ripe when the ROD was issued in March 1999. CRV did not enter into its option agreement with Dutra until August 2000, and it did not exercise its option to purchase the property until November 2002.[8] Because the claim accrued and ripened before plaintiffs acquired the property, plaintiffs cannot state a regulatory takings claim. That claim, if it existed, was owned by the prior owner.

We conclude that plaintiffs did not state a valid physical takings claim, and, to the extent they allege a regulatory takings claim, that claim is barred because plaintiffs did not own a valid property interest at the time of the alleged regulatory taking.

AFFIRMED

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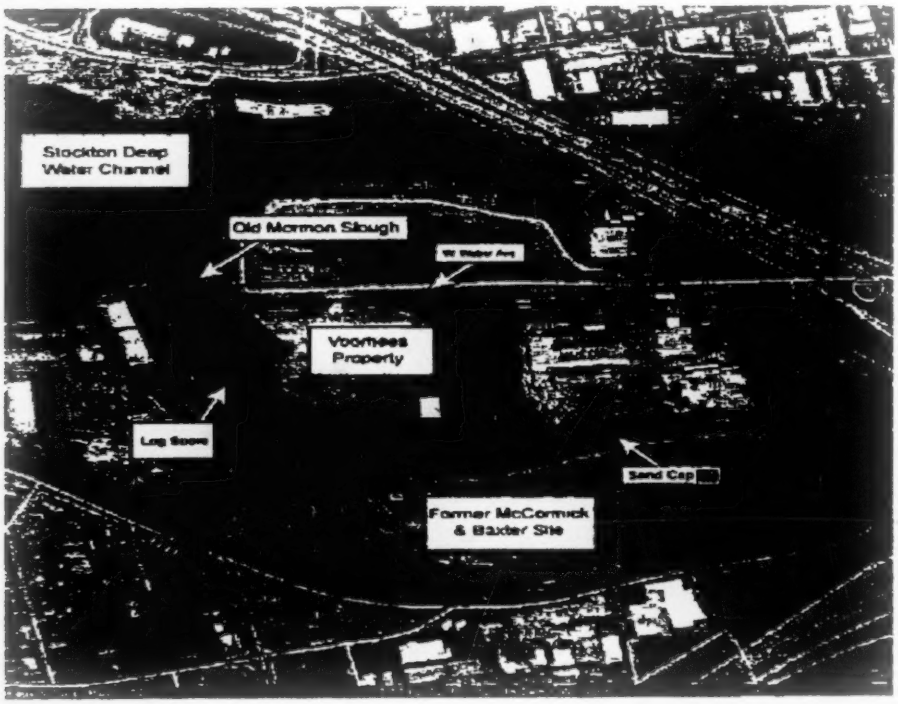
[8] Even if the final government action were deemed to be EPA's November 20, 2000, refusal to modify the proposal in response to Dutra's alternative plan, the action would still have been taken before the transfer of the property in November 2002.

APPENDIX

Map of Slough Area After Permanent Log Boom Installation



"©2009 Google, Map Data © Tele Atlas.

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Diagram of EPA's Alternative SD-2, Adopted in its Record of Decision

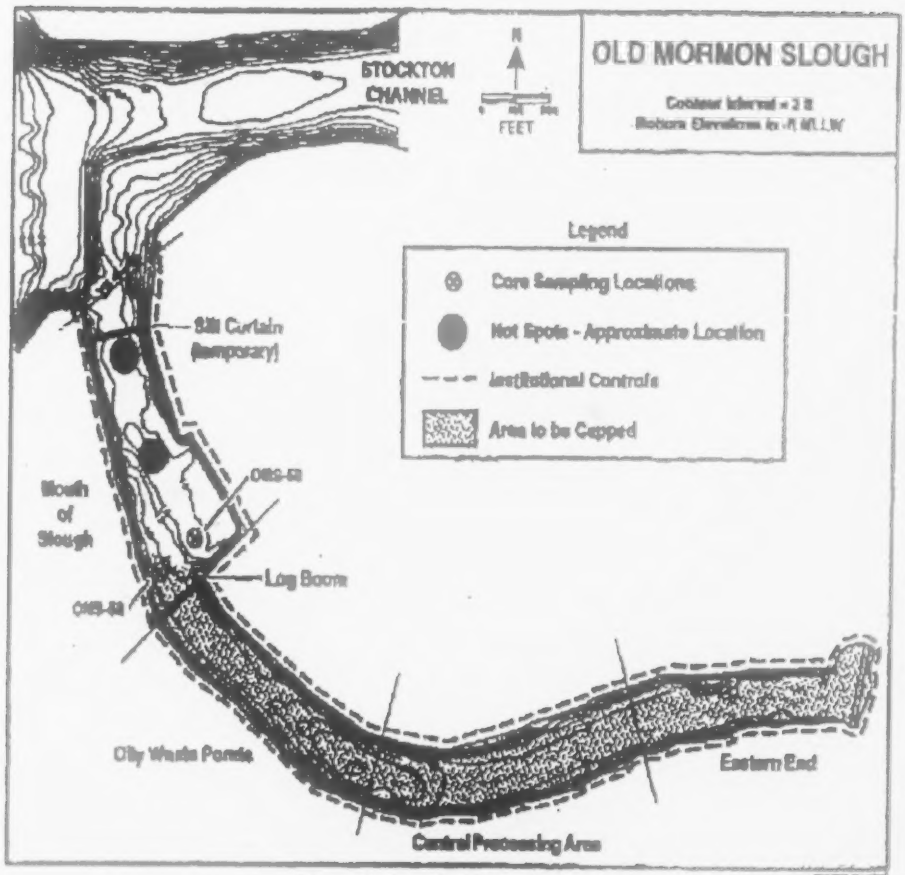

Figure 4.1. Alternative SD-2, In Situ Capping

In the United States Court of Federal Claims

No. 06-660L

Filed: April 30, 2009

TO BE PUBLISHED

**********	*	Assignment of Claims Act, 31 U.S.C. § 3727(b);
CRV ENTERPRISES, INC., and C. RYAN VOORHEES,	*	Claim Accrual;
	*	Estoppel;
	*	Jurisdiction;
	*	Littoral Rights;
Plaintiffs,	*	Just Compensation Clause, U.S. CONST. amend. V;
v.	*	RCFC 12(h)(3);
	*	Regulatory Taking;
THE UNITED STATES,	*	Riparian Rights;
	*	Standing;
	*	Statute of Limitations;
Defendant.	*	Waiver.
**********		

Bruce Allen McIntosh and John Harvey Patton, Shapiro Buchman, Walnut Creek, California, Counsel for Plaintiffs.

William James Shapiro, United States Department of Justice, Sacramento, California, Counsel for Defendant.

Laurie Williams, Assistant Regional Counsel, U.S. Environmental Protection Agency, Region 9, San Francisco, California, Of Counsel for Defendant.

MEMORANDUM OPINION AND FINAL ORDER OF DISMISSAL

I. RELEVANT FACTUAL BACKGROUND[1]

The Old Mormon Slough ("OMS") is a man-made waterway, approximately 2500-feet long and 180-feet wide, located in Stockton, California, about fifty miles south of Sacramento. *See* Gov't Ex. 20 at DOJ 203. The OMS connects to the Stockton Deep Water Channel that, in turn, connects to the San Joaquin River. *See* 4/11/2008 Patton Decl. Ex. 5. Ships can reach the San Francisco Bay via the Stockton Deep Water Channel and the San Joaquin River. *See* 4/11/2008 Voorhees Decl.¶ 6.

Directly south of the OMS is the former site of the McCormick & Baxter Creosoting Company ("M&B"), a wood-preserving operation. See Gov't Ex. 20 at DOJ 201. From 1976 to 1990, the State of California repeatedly found that M&B illegally discharged

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[1] The facts cited herein were derived from: Plaintiffs' January 23, 2008 Amended Complaint ("Am. Compl."); the April 11, 2008 Declaration of Ryan Voorhees ("4/11/2008 Voorhees Decl."); the April 11, 2008 Declaration of John H. Patton and Exhibits ("4/11/2008 Patton Decl. Ex. 1-11"); the Defendant ("Government"'s) April 15, 2008 Exhibits 1-36 In Support Of Motion To Dismiss Or, In The Alternative, Motion For Summary Judgment ("Gov't Ex. 1-36"); and the parties' April 8, 2009 Submission Of Joint Exhibits ("Joint Sub. Ex. 1-2"). Where a Government Exhibit is cited, the DOJ page number also is provided.

hazardous chemicals into the OMS. *Id.* at DOJ 204-06. In 1990, M&B ceased operations. *Id.* at DOJ 206.

In October 1992, the M&B site was added to the National Priorities List, authorizing the Environmental Protection Agency ("EPA") to use resources appropriated under the Comprehensive Environmental Response, Compensation, and Liability Act for environmental clean-up projects. *See* Gov't Ex. 12 at DOJ 32-33. Subsequently, the EPA conducted several removal actions to stabilize environmental conditions at the M&B site, improve security, and demolish and dispose of aboveground structures and equipment. *See* Gov't Ex. 20 at DOJ 206.

During 1996 and 1997, the EPA installed a sheet piling wall along the southwestern shoreline of the OMS to control oil seepage. *Id.* The EPA also excavated roughly 12,000 cubic yards of contaminated soil from the pond area and covered the central processing area with an asphalt cap. *Id.*

In July 1998, the EPA issued a draft Surface Water-Sediment Feasibility Study Report for the M&B site for public comment. See Gov't Ex. 17 at DOJ 77. The public comment period closed on November 16, 1998. *See* Gov't Ex. 19 at DOJ 183.

In January 1999, the EPA issued a final Surface Water-Sediment Feasibility Study Report for the M&B site ("1999 Water-Sediment Report"). *See* Gov't Ex. 20 at DOJ 184. The 1999 Water-Sediment Report concluded that sediment contamination in the OMS, from toxic runoff at the M&B site, posed a potential risk to human health.

> If sediment contamination in Old Mormon Slough is not addressed, it will continue to

> present a risk to ecological receptors, and to human receptors who consume significant quantities of certain fish species[.] . . . [P]otential human health risks have been identified related to soil and groundwater contamination. . . . If not addressed, contaminated soil and groundwater will continue to represent potential risks to site workers and nearby residents.

Id. at DOJ 222.

The 1999 Water-Sediment Report analyzed several possible solutions to reduce the risk of human and environmental exposure to toxic chemicals on the sediment bottom of the OMS. *Id.* at DOJ 250-67. On March 31, 1999, the EPA issued a Record of Decision ("ROD"), adopting Alternative SD-2 to treat contamination in the OMS. *See* Gov't Ex. 21 at DOJ 358. Alterative SD-2 provided that a sand cap first would be placed over the contaminated soil to isolate areas of principal threat. *See* Gov't Ex. 20 at DOJ 259-60, 268. Then, a log boom would be placed at the mouth of the OMS to cut off navigational access over the area protected by the sand cap. *Id.* at 268. This solution was designed to prevent inadvertent erosion or other disruptions of the sand cap by marine traffic that could expose more highly contaminated sediment. *Id.* at 259-60.

The property at issue in this case lies along the northern shore of the OMS, opposite from the M&B site. *See* Gov't Ex. 29 at DOJ 436. On March 31, 1999, when the EPA issued the ROD, the property was owned by Bill T. Dutra, President of The Dutra Group. *Id.* at DOJ 429.

On September 22, 1999, the EPA advised The Dutra Group that it planned to install a sand cap and log boom across the OMS to address contaminated sediment. *See* Gov't Ex. 29 at DOJ 434. On October 20, 1999, The Dutra Group objected, because of a concern that this action would severely limit marine access to their property. *Id.* at DOJ 454. Instead, The Dutra Group suggested that the EPA consider dredging, as an alternative remediation solution. *Id.* On November 20, 2000, the EPA rejected this proposal, because it would be eleven times more expensive than the proposed remedy and no more effective. *Id.* at DOJ 460-61.

In the summer of 2000, C. Ryan Voorhees, the Director, President, and Managing Officer of CRV Enterprises, Inc. ("CRV"), became interested in The Dutra Group property, having just acquired property immediately to the north and northeast. *See* 4/11/2008 Voorhees Decl. ¶¶ 3, 7. On August 25, 2000, CRV entered into an Option Agreement with Bill Dutra to purchase the property. *See* Gov't Ex. 29 at DOJ 441. The Option Agreement contained a "Hazardous Substances" clause that provided: "[f]or the purposes of this [Option] Agreement, the McCormick & Baxter Superfund site, opposite the Property, on Mormon Slough, the Slough itself, and the 'Hazardous Substances' located thereon or thereunder, shall not be considered 'relevantly adjacent' to the Property." *Id.* at DOJ 442.

On October 1, 2001, CRV and Mr. Dutra amended the August 25, 2000 Option Agreement to allow CRV to exercise its option and close on February 1, 2002. *Id.* at DOJ 467. On November 29, 2001, representatives from the EPA and Mr. Dutra met with

Mr. Voorhees to discuss the EPA's plans for the OMS. See Gov't Ex. 24 at DOJ 391. On January 21, 2002, however, Mr. Voorhees accused Mr. Dutra of failing to inform him of the EPA's plans for the OMS and of planned restrictions on marine traffic. *See* Gov't Ex. 26 at DOJ 426.

On January 30, 2002, the Option Agreement between CRV and Mr. Dutra again was amended. *See* Gov't Ex. 29 at DOJ 468, 471. On August 26, 2002, Mr. Voorhees met with representatives of The Dutra Group and the EPA to discuss the "Permanent Post-Construction Impacts" and a "Takings Claim." *See* Gov't Ex. 27 at DOJ 427; *see also* Gov't Ex. 28 at DOJ 428.

On October 28, 2002, a final Option Agreement was executed to reflect that CRV was "aware that the [Government] has taken the position that it has no legal obligation to pay damages or compensation for damage or injury to the Subject Property resulting from implementation of the Remedy[.]" Gov't Ex. 29 at DOJ 472. In addition, CRV was assigned all "right, title and interest in and to a certain cause of action against the United States of America for damages, loss of use, and/or taking of real property arising from or relating to EPA's implementation of the Remedy[.]" *Id.* at DOJ 473.

On November 8, 2002, CRV completed acquisition of the property. *See* Gov't Ex. 1 at DOJ 1.[2] When CRV

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[2] On October 20, 2004, CRV deeded the property to Mr. Voorhees after his accountant suggested it would be more appropriate for Mr. Voorhees to hold title, since he provided the funds to purchase the property. *See* Gov't Ex. 2 at DOJ 4; *see also* 4/11/2008 Voorhees Decl.¶ 19.

acquired this property, the entire OMS could be used by commercial barges and small to medium sized vessels, such as motor boats, sailboats, recreational fishing boats, and house boats. *See* 4/11/2008 Voorhees Decl. ¶ 8.

II. PROCEDURAL HISTORY.

On April 30, 2003, CRV filed an inverse condemnation action in the United States Court of Federal Claims that was assigned to the Honorable George W. Miller. *See CRV Enters., Inc. v. United States*, No. 03-867L (G. Miller, J.). At that time, the EPA had not installed the sand cap or log boom in the OMS. *See* Stip. Dis. at 1, *CRV*, No. 03-867L. On May 4, 2005, CRV and the Government entered a Stipulation to dismiss CRV's April 30, 2003 action, because the EPA had not commenced the planned remediation. *Id.* The parties stipulated that "until and unless EPA undertakes activities that CRV believes blocks its navigational access, in part or in whole, to the Old Mormon Slough and the Stockton Channel, that CRV's claims of a taking by EPA are not ripe." *Id.* at 2. On May 4, 2005, the April 30, 2003 inverse condemnation case was dismissed, without prejudice.

On June 1, 2006, the EPA began construction of a two-foot fine sand cap to be placed over the sediment bottom of the OMS and the installation of a silt curtain across the mouth of the OMS channel, a temporary sheet pile, and a permanent log boom to cut off marine traffic from the capped area of the OMS. *See* Am. Compl. ¶ 24. The EPA completed the installation of both the sand cap and log boom on September 30, 2006. *Id.*

On September 19, 2006, CRV and Mr. Voorhees ("Plaintiffs") filed a second Complaint in the United States Court of Federal Claims, alleging that the EPA's OMS remediation effected a taking of Plaintiffs' private property. *See* Compl. ¶32. This action also was assigned to the Honorable George W. Miller. On December 20, 2006, the Government filed an Answer.

On June 11, 2007, the Government filed a Motion To Compel to require Plaintiffs to file initial disclosures and responses to interrogatories. On June 12, 2007, the court granted the Government's Motion and Plaintiffs were required to file disclosures and responses by close of business on that day.

On August 13, 2007, the parties filed a Joint Motion To Amend Discovery Schedule, requesting an additional sixty days to file dispositive motions. On August 17, 2009, the parties' Joint Motion was granted. On December 4, 2007, the parties filed a second Joint Motion, requesting an additional thirty days to complete liability related depositions and an additional forty-five days to file dispositive motions. On December 5, 2007, the court granted this motion.

On January 16, 2008, Plaintiffs filed a Motion To Amend Complaint that was granted by the court on January 22, 2009. On January 23, 2008, Plaintiffs filed an Amended Complaint, alleging that:

> [the Government's] construction and maintenance of its remediation project for the M&B Site . . . amounts to a public taking of and interference with plaintiffs' interests in private property [and] amounts to a public denial of and interference with the full, highest, and best use and enjoyment of such

> private property, and permanently destroys economically viable uses of such property.

Am. Compl. ¶ 33. Compensatory damages of $1,250,000 were requested, together with ancillary relief. *Id.* (Prayer) ¶ 1.

On January 29, 2008, the court entered a new scheduling order, setting April 15, 2008 as the date for the filing of any dispositive motions. On February 5, 2008, the Government filed an Answer to the Amended Complaint.

On April 11, 2008, Plaintiffs filed a Motion and Memorandum In Support Of Order Granting Interlocutory Summary Judgment On Liability Issues ("Pl. Mem. S.J."), together with the 4/11/08 Patton Declaration and the 4/11/08Voorhees Declaration. On April 15, 2008, the Government filed a Motion To Dismiss Or, In The Alternative, Motion For Summary Judgment And Memorandum In Support, together with Government Exhibits 1-36.

On May 30, 2008, Plaintiffs filed an Opposition to the United States' Motion To Dismiss Or, In The Alternative, For Summary Judgment ("Pl. Opp."), together with the 5/30/2008 Patton Declaration, 5/30/08 Voorhees Declaration, and 5/30/08 Dr. Benoit Declaration. On the same date, the Government filed an Opposition to Plaintiffs' April 11, 2008 Motion For Interlocutory Summary Judgment.

On June 6, 2008, the Government filed a Motion To Strike the Declaration of Dr. Benoit and stay the briefing schedule for dispositive motions. On June 23, 2008, Plaintiffs filed a Response. On July 7, 2008, the Government filed a Reply. On July 22, 2008, Judge George W. Miller denied the Government's Motion To

Strike and set dates for final briefing on the parties' cross-motions.

* * *

On October 7, 2008, the case was transferred to the undersigned judge. On November 20, 2008, depositions were completed.

On December 22, 2008, Plaintiffs filed a Reply to the Government's April 15, 2008 Opposition ("Pl. Reply"). On the same date, the Government filed a Reply to the Plaintiffs' May 30, 2008 Opposition.

On March 24, 2009, the court held oral argument. *See* 3/24/09 TR at 1-69.

On April 8, 2009, the parties filed a Submission Of Joint Exhibits, attaching a map of Plaintiffs' property and location relative to the OMS. On April 10, 2009, the Government filed a Notice Of Supplemental Authority. On April 16, 2009, Plaintiffs filed a Response.

III. DISCUSSION.

A. Jurisdiction.

The jurisdiction of the United States Court of Federal Claims was established by the Tucker Act. *See* 28 U.S.C. § 1491. This Act authorizes the court "to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1). The Tucker Act, however, is "a jurisdictional statute; it does not create any

substantive right enforceable against the United States for money damages. . . . [T]he Act merely confers jurisdiction upon it whenever the substantive right exists." *United States v. Testan*, 424 U.S. 392, 398 (1976). Therefore, a plaintiff must identify and plead an independent contractual relationship, constitutional provision, federal statute, or executive agency regulation that provides a substantive right to money damages. *See Fisher v. United States*, 402 F.3d 1167, 1172 (Fed. Cir. 2005) (en banc) ("The Tucker Act itself does not create a substantive cause of action; in order to come within the jurisdictional reach and the waiver of the Tucker Act, a plaintiff must identify a separate source of substantive law that creates the right to money damages."). The burden of establishing jurisdiction falls upon the plaintiff. *See FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990) (holding that the burden is on the plaintiff to allege facts sufficient to establish jurisdiction).

The United States Court of Appeals for the Federal Circuit has held that the Takings Clause of the Fifth Amendment is "money-mandating." *See Moden v. United States*, 404 F.3d 1335, 1341 (Fed. Cir. 2005) ("If there is a taking, the claim is founded upon the Constitution and within the jurisdiction of the Court of [Federal] Claims to hear and determine."). Therefore, "to the extent [Plaintiffs] have a nonfrivolous takings claim founded upon the Fifth Amendment, jurisdiction under the Tucker Act is proper." *Id.* at 1341.

B. The Takings Claims Alleged In The Amended Complaint.

The January 23, 2008 Amended Complaint states that this action is a "claim for money damages as compensation . . . arising out of the [Government's]

uncompensated taking of and injury to *real property* owned by [P]laintiffs[.]" Am. Compl. ¶ 1 (emphasis added). Specifically, the Amended Complaint describes the Government's remediation project as the "removal and stabilization actions at the . . . site, including demolition and disposal of structures and equipment, excavation of contaminated soil and containment of same in a lined depository, installation of a short piling wall along the southwestern shoreline of the Mormon Channel, all intended to control oily seepages from the former oily waste pond area." *Id.* ¶ 22. The Amended Complaint also alleges that "[c]ertain of the remediation improvements . . . are a permanent physical invasion, interfering with and substantially *disrupting plaintiffs' property rights . . . precluding any marine access to or egress* from a substantial majority of [Plaintiffs'] property and dispossessing plaintiffs from such beneficial use and enjoyment." *Id.* ¶ 24 (emphasis added). In addition, the Amended Complaint references other "valuable maritime use[s]." *Id.* ¶ 30.

The Amended Complaint has been construed by the court to allege that Plaintiffs have an interest in real property as well as riparian rights[3] that have been adversely affected by the Government's "construction and maintenance of [the] remediation project." *Id.* ¶ 33.

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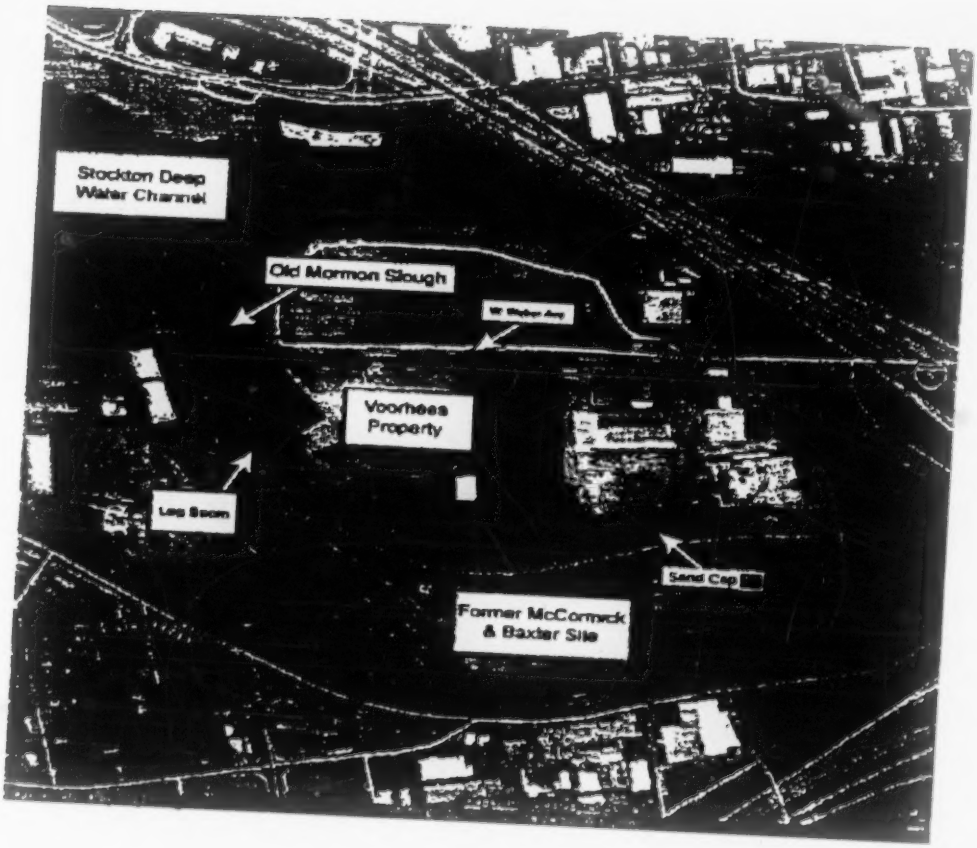
[3] "Riparian" is defined as "of, relating to, or located on the bank of a river or stream." BLACK'S LAW DICTIONARY 1352 (8th ed. 2004).

C. The Court Does Not Have Jurisdiction To Adjudicate The Takings Claims Alleged In The Amended Complaint.

Although Plaintiffs filed a motion requesting interlocutory summary judgment on liability, nevertheless, the court first must ascertain whether it has jurisdiction to adjudicate the takings claims alleged in the Amended Complaint. *See* RCFC 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."); *see also Consolidation Coal Co. v. United States*, 351 F.3d 1374, 1378 (Fed. Cir. 2003) ("[U]nder federal rules any court at any stage in the proceedings may address jurisdictional issues. Thus, even if the issue is not properly raised, this court *sua sponte* may consider all bases for the trial court's jurisdiction."). For the reasons that follow, the court has determined it does not have jurisdiction. Therefore, the court has not addressed herein numerous arguments by the parties as to the substantive merits of the takings claims alleged.

1. Plaintiffs Failed To Establish Any Physical Invasion Of Their Real Property.

Although the Amended Complaint alleged a taking of "real property," Plaintiffs have not established any physical invasion of their real property at any time. As is evident by the following ariel map submitted by the parties, the sand cap and log boom are located in the OMS.



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See e.g., Joint Sub. Ex. 1[4]; *see also* Gov't Ex. 1 at DOJ 1-2 (legal description of property); Gov't Ex. 5 at DOJ 11 (survey of property); 3/24/09 TR at 6.

For these reasons, the court has determined Plaintiffs failed to establish any physical invasion of their real property at any time. *See Loretto v.*

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[4] This ariel map is reproduced herein with the consent of Google™.

Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) (stating that a taking "may more readily be found when the interference with property can be characterized as a physical invasion by government[.] . . . [W]e have long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause."). Likewise, neither the sand cap nor log boom denies Plaintiffs physical access via the land to their real property. *Id.*

2. Plaintiffs Have Alleged Regulatory Takings Claims.

California law recognizes a "riparian right of access to the navigable part of waters" as a "protectable property right[.]" *San Francisco Sav. Union v. R.G.R. Petroleum & Mining Co.*, 77 P. 823, 824-25 (Cal. 1904); *see also Yates v. City of Milwaukee*, 77 U.S. 497, 505 (1870) (a "riparian right is property, and is valuable[.]"); *Ball v. United States*, 1 Cl. Ct. 180, 183 (1982) (holding that riparian water rights "cannot be taken except for the public use and upon payment of just compensation.") (internal quotation omitted). Because the State of California retains title to all public waters, a property owner with a riparian right of access may use those waters, but that right is burdened with a servitude "in favor of the state in the exercise of its trust power over navigable waters." *Marks v. Whitney*, 6 Cal. 3d 251, 263 (Cal. 1971); *see also* Cal. CONST. art. X, § 2.

In addition, California law recognizes littoral[5] rights, *i.e.*, "a right to build a pier out to the line of navigability; a right to accretion; a right to navigation (the latter right being held in common with the general public); and a right of access from every part of his frontage across the foreshore." *Marks*, 6 Cal. 3d at 263.

Plaintiffs have argued that the riparian right of access to the navigable part of the OMS has been taken, as well as the littoral rights "in the foreshore of their property adjacent to the OMS, rights of navigation, rights of access from every part of their frontage on the OMS across the foreshore, rights to build piers or docks slips, and rights of reasonable and beneficial use of the OMS." Pl. Mem. S.J. at 17. Specifically, the installation of the permanent log boom prevented maritime access south and east of the boom. *See* Joint Sub. Ex. 1; *see also* Pl. Mem. S.J. at 17.

In *Casitas Municipal Water Dist. v. United States*, 543 F.3d 1276 (Fed. Cir. 2008), *reh'g denied*, 556 F.3d 1329 (Fed. Cir. 2009), the United States Court of Appeals for the Federal Circuit recently discussed the distinction between a physical and a regulatory taking when water and related rights are at issue. In that case, the plaintiff entered into a contract in 1956 with the United States to construct a system of dams, canals, and reservoirs to provide water for Ventura County, California. *See Casitas Municipal Water Dist.*, 543 F.3d at 1280. As part of the contract, plaintiff was given a "perpetual right to use all water that becomes available though the construction and operation of the

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[5] "Littoral" is defined as "of or relating to the coast or shore of an ocean, sea, or lake." BLACK'S LAW DICTIONARY 952 (8th ed. 2004). Since the OMS is a man-made slough, Plaintiffs arguably have no littoral rights to assert in this case.

[system]." *Id.* at 1281-82. In 2003, the Bureau of Reclamation ordered plaintiff to construct a fish ladder at the intersection of two dams, to allow both upstream and downstream fish migration, to protect the endangered West Coast steelhead trout. *Id.* at 1290-91. The ladder operated by diverting water that would have otherwise ended up in a reservoir for plaintiff's use. *Id.* In 2005, plaintiff filed suit in the United States Court of Federal Claims, alleging that the Government's actions were a taking of plaintiff's water. *Id.* at 1282. The trial court ruled on a motion for partial summary judgment that a regulatory takings standard applied to plaintiff's claim, instead of a physical takings standard. *Id.* at 1283.

On appeal, the United States Court of Appeals for the Federal Circuit reversed, holding that the trial court first should ascertain "the character of the government action when determining whether a physical or regulatory taking has occurred." *Id.* at 1290. Our appellate court was persuaded that physical takings rules applied, because "the government did commandeer the water for a public use-preservation of an endangered species. When the government diverted the water to the fish ladder, it took [plaintiff's] water." *Id.* at 1294. Once the water was diverted down the fish ladder, it was "forever gone." *Id.* at 1296. The nature and permanence of the Government's action was characterized as a physical taking in contrast to a regulatory taking, where a restriction "merely maintain[s] the status quo" and leaves "the right in the same state it was before the government action." *Id.*

In this case, the Amended Complaint properly did not allege that Plaintiffs had any rights to the water in the OMS, but instead alleges that the Government

remediation of the OMS "amounts to a public taking of and interference with Plaintiffs' interests in private property." *See* Am. Compl. ¶ 33. Plaintiffs further argue that the remediation effected a "*physical* deprivation of plaintiffs' riparian rights" and should be adjudicated under a physical taking standard. *See* Pl. Mem. S.J. at 18. Neither the sand cap nor the log boom, however, deprives Plaintiffs of the riparian right of access to the navigable part of the OMS. *See* Joint Sub. Ex. 1. Plaintiffs' riparian right of access to the OMS or navigation therein only was restricted, not eliminated. *Id.*; *see also* 3/24/09 TR at 25 (THE COURT: "Well, can a boat get to your property?" PLAINTIFF'S COUNSEL: "Yes."); TR 35 (THE COURT: "Well, you have access to the water from the property to the water frontage, there's no barrier?" PLAINTIFF'S COUNSEL: "In the notched area at the end of the property, correct, which is to the west of the log boom.").

Assuming *arguendo* that the "valuable maritime uses" alleged in the Amended Complaint are coextensive with littoral rights, as recognized by California law, Plaintiffs still have not established that they have been denied the right to build a pier or dock into the navigable portion of the OMS, the benefit of alluvion to their real property on the bank of the OMS, the ability to navigate the navigable portion of the OMS, or the use of the shoreline of their property between high and low tide. To the extent Plaintiffs cannot use the OMS from the log boom south and east to access their property, such a limited lack of access does not rise to a taking. *See Laney v. United States*, 228 Ct. Cl. 519, 661 F.2d 145, 149 (1981) ("It has always been held that where the owner has access to his property on one, two, or three sides, that his access

from the property . . . on one side is cut off is not a taking, even if the economic fruitfulness of the block is substantially impaired. On the other hand, if his access to his block on all four sides is cut off, that is a taking[.]"). Here, Plaintiffs have retained approximately forty percent of access to frontage of their property on the OMS. *See* Joint Sub. Ex. 1; *see also* Pl. Mem. S.J. at 17.

Therefore, the character of the Government's remediation efforts in this case is tantamount to "interference aris[ing] from some public program adjusting the benefits and burdens of economic life to promote the common good." *Loretto*, 458 U.S. at 426. This case is not one where Plaintiffs' rights are "forever gone." *Casitas Municipal Water Dist.*, 543 F.3d at 1294. Accordingly, the court has determined that the claims alleged in this case concern regulatory takings.

3. Plaintiffs' Regulatory Takings Claims Are Barred By The Statute Of Limitations.

Section 2501 of Title 28 of the United States Code provides: "[e]very claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. § 2501.

As a matter of law, "[a] takings claim accrues when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action." *See John R. Sand & Gravel Co. v. United States*, 457 F.3d 1345, 1355-56 (Fed. Cir. 2006), *aff'd* 128 S. Ct. 750, 753 (2008) (internal quotation omitted). Our appellate court has recited this language in both physical takings and regulatory

takings cases, although the application of this standard differs depending on which theory is applicable. *Compare Goodrich v. United States*, 434 F.3d 329 (Fed. Cir. 2006) (holding that a regulatory taking accrues when the Government issued a ROD that impacted plaintiff's grazing rights) *with John R. Sand & Gravel Co.*, 457 F.3d 1345 (holding that a physical taking did not accrue when the EPA issued a ROD affecting plaintiff's property). Therefore, a closer look at the facts and holding in each case is required.

Goodrich concerned a plaintiff who had a permit to graze cattle on the Whitetail Allotment in the Lewis and Clark National Forest. *See Goodrich*, 434 F.3d at 1331. On February 27, 1997, the United States Forest Service issued a ROD to allow the cattle of a third party also to enter and graze in the Whitetail Allotment. *Id.* at 1332. The "third party" cattle, however, did not physically enter the Whitetail Allotment until July 1, 2000, at which time plaintiff's grazing rights were diminished. *Id.* On June 9, 2004, plaintiff filed suit in the United States Court of Federal Claims alleging that, by allowing a third party to graze on the Whitetail Allotment, the Government had taken plaintiff's exclusive grazing rights, without compensation. *Id.* at 1332-33. The trial court held that the alleged taking was regulatory in nature and the issuance of the February 27, 1997 ROD, ordering the transfer of cattle marked the accrual of plaintiff's taking claim, placing plaintiff's claim outside the six-year statute of limitations. *Id.*

On appeal, the United States Court of Appeals for the Federal Circuit affirmed, holding that "the proper focus for statute of limitations purposes is upon the time of the [Government's] *acts*, not upon the time at

which the *consequences* of the acts became most painful." *Id.* at 1333-34 (internal quotations omitted). Therefore, the court held that the February 27, 1997 issuance of the ROD was the proper date for the accrual of the cause of action, explaining:

> As between issuance of the ROD and the actual physical appropriation by cattle of water, we believe the former is a better place to deem any taking occurred. First, the question of damages is discrete from the question of claim accrual. As the court in *Fallini* [v. *United States*, 56 F.3d 1378 (Fed. Cir. 1995)] stated, the obligation to sue arises once the permanent nature of the government action is evident, regardless of whether damages are complete and fully calculable. Second, as a practical matter, it will often be much easier for the parties to correct a wrongful taking if litigation is initiated *before* its effects are felt . . . Thus, we conclude that the issuance of a ROD and final [Environmental Impact Statement] is sufficient to constitute the taking and hence accrue a takings claim, regardless of when the consequences of the decisions contained therein are felt.

Id. at 1336 (internal quotations omitted).

In *John R. Sand & Gravel Co.*, plaintiff leased a 158-acre tract in Michigan in 1969 for a fifty-year term and was given the exclusive use of the property for mining of sand and gravel. *See John R. Sand & Gravel Co.*, 457 F.3d at 1347. When plaintiff signed the lease, a landfill was in operation on the northern portion of the leased property. *Id.* During the landfill's

operation, it illegally accepted and buried drums of solid and liquid industrial waste. *Id.* In 1980, the landfill was closed, and in 1984 was listed by the EPA as a Superfund site because of the large amount of hazardous waste that was buried beneath the land. *Id.* at 1347-48.

In 1986, a ROD was issued for the site requiring the EPA to excavate buried drums, take soil samples, install groundwater monitoring wells, and construct a storage pad. *Id.* at 1348. In 1990, the EPA issued a second ROD requiring construction of a fence around the site to restrict access, but the ROD did not provide the metes and bounds of the fence. *Id.* In the winter of 1992-1993, the EPA erected a fence that enclosed sixty percent of the site, preventing plaintiff access to mining operations. *Id.* Subsequently, with the EPA's consent, plaintiff relocated the fence so mining operations could resume. *Id.* In February 1994, the EPA constructed a new internal security fence that cut off the plaintiff's access. *Id.* The plaintiff's mining operations continued until 1996, despite the fencing. *Id.* at 1348-49.

On May 20, 2002, a suit was filed in the United States Court of Federal Claims alleging that the EPA's remedial action, including the construction of a fence, was a permanent physical taking of plaintiff's right to mine sand and gravel. *Id.* The trial court held that the Government's obstruction of plaintiff's access to the leased property was not a taking, because plaintiff could not demonstrate a legally-cognizable property interest. *Id.* at 1351. In addition, the trial court determined that the date of accrual for plaintiff's takings claim was 1998, when the EPA completed the final relocation of the fencing. *Id.*

Although the United States Court of Appeals for the Federal Circuit recognized that plaintiff's mining rights were private property, the takings claim was barred by the statute of limitations, because a "physical occupation by the government only comprises a taking when that occupation is permanent." *Id.* at 1357 (internal quotations omitted). A government occupation is permanent "when the government's intrusion is a substantial physical occupation of private property." *Id.* (internal quotations omitted). Therefore, plaintiff's cause of action accrued when the internal security fence was initially completed in 1994 and the EPA took possession of the former landfill site "bar[ing] [plaintiff] from portions of the [] property." *Id.*

In holding July 1994 as the date of accrual, the court observed that the EPA's issuance of RODs in 1986 and 1990 "was not sufficient for a physical takings claim to accrue in this case." *Id.* at 1357 n.10. The court acknowledged that *Goodrich* took a different view of the effect of an ROD, but distinguished that decision in this way:

> First, unlike *Goodrich*, [plaintiff's] claim is for a physical taking, rather than a regulatory taking. Second, the two RODs issued with regard to the [landfill] did not contain the level of detail about the government's action necessary for a claim to accrue . . . The 1986 ROD did not set forth the long-term plan for site remediation challenged by [plaintiff]. The 1990 ROD did propose a long-term remediation plan involving a landfill cap system. However, the ROD did not set forth the metes and

> bounds of the landfill cap or a specific time frame for its completion.

Id.

In this case, Plaintiffs and the Government disagree on the date the alleged takings claims accrued. Plaintiffs argue that the takings accrued on September 30, 2006, when construction of the log boom was completed. *See* 3/24/09 TR at 19-20. On the other hand, the Government argues that the takings accrued on March 31, 1999, when the ROD was issued. *Id.* at 12.

Since the court has determined that Plaintiffs' only viable claims were regulatory takings, the date of accrual is March 31, 1999, when the ROD was issued. *See Goodrich*, 434 F.3d at 1336. The Amended Complaint, however, was not filed in this case until September 19, 2006, more than six years later. *See* Am. Compl. Recognizing this fatal jurisdictional defect, Plaintiffs argue that the statute of limitations should be tolled or that the Government be estopped from raising a statute of limitations argument based on the filing and dismissal of the April 30, 2003 inverse condemnation claim arising out of the same events. *See* Pl. Reply at 2; *see also* TR at 18. Plaintiffs argue that in similar situations in the past, the court has ruled that "the timely filing of the initial takings action against the Government equitably tolls the running of the statute of limitations. *See* Pl. Opp. at 18 (citing *George F. Miller Farms, Ltd. v. Untied States*, 27 Fed. Cl. 672, 672-73 (1993)). Plaintiffs argue that since the Government agreed that Plaintiffs' takings claims were not ripe, the "doctrine of judicial estoppel prevents the Government from now asserting this [statute of

limitations] defense." *Id.* (citing *New Hampshire v. Maine*, 532 U.S. 742, 749-51 (2001)).

In 2008, however, the United States Supreme Court held that the statute of limitations in 28 U.S.C. § 2501 is "jurisdictional" in nature. *See John R. Sand & Gravel Co.*, 128 S. Ct. at 753. Rather than protecting "a defendant's case-specific interest in timeliness," the Court explained that a jurisdictional statue of limitations works "to achieve a broader system-related goal, such as facilitating the administration of claims, limiting the scope of a government waiver of sovereign immunity, or promoting judicial efficiency." *Id.* at 753 (citations omitted). Thus, jurisdictional statutes of limitations require "a court to decide a timeliness question despite a waiver, or [forbid] a court to consider whether certain equitable considerations warrant extending a limitations period." *Id.* Therefore, it is now settled that equitable tolling and estoppel do not extend the six-year statute of limitations embedded in 28 U.S.C. § 2501. *See Black v. United States*, 84 Fed. Cl. 439, 450 (2008) ("[E]quitable tolling . . . is foreclosed by the Supreme Court's decision in *John R. Sand & Gravel Co.*"); *see also Add v. United States*, 81 Fed. Cl. 415, 421 (2008) ("Equitable tolling of § 2501 is now foreclosed by binding precedent, as are similar arguments based on the doctrines of estoppel and waiver."). Accordingly, the May 4, 2005 Stipulation has no legal effect as a waiver in this case.

On the other hand, it is correct that a regulatory taking accrues only when "the claimant knew or should have known that the claim existed." *Goodrich*, 434 F.3d at 1333 (internal quotations omitted). Therefore, Plaintiffs' counsel asserted at oral argument that,

because the March 31, 1999 ROD did not provide any specific information about the installation of a log boom, Plaintiffs could not have known that a log boom restricting their property's marine access would be part of the EPA's planned remediation. *See* 3/24/09 TR at 41-43. The March 31, 1999 ROD only references the erection of "institutional controls" and does not discuss the imposition of a log boom or where it would be located. *Id.* Therefore, Plaintiffs argue that a taking did not accrue on that date because, without any specific detail, they could not have known that a claim existed. *Id.*

Although the ROD does not specifically mention a log boom, there was more public information available about the EPA's plans than Plaintiffs admit. *See* Gov't Ex. 21 at DOJ 355-59. In discussing the eastern portion of the OMS where the sand cap would be installed, the ROD states: "[s]imilar institutional controls would be implemented for the capped portion of Old Mormon Slough to prevent inadvertent erosion or other disruption of in-situ sediment cap materials that could cause exposure of more highly contaminated sediment under the cap." *Id.* at DOJ 359. "Similar" refers to the previous paragraph, where the ROD states: "[i]nstitutional controls to limit navigational access to the slough." *Id.* at DOJ 359. Therefore, the ROD makes clear that navigational access to the OMS will be restricted by "institutional controls."

In addition, other public documents provide specific information about the log boom construction. In July 1998, a draft of the Surface Water-Sediment Feasibility Study Report was released for public comment. *See* Gov't Ex. 17 at DOJ 77. That report analyzed several proposed remedial actions for treating

contamination in the OMS. *Id.* Alternative SD-2, the remedy of capping a portion of the OMS that ultimately was specified in the ROD, provides a map of the OMS that specifically identifies the log boom and where it would be placed. *Id.* at DOJ 138. The location identified on the draft Report map matches the present location of the log boom. *Compare id. with* Joint Sub. Ex. 1. The January 1999 Final Report contains the same map identifying the placement of the log boom. *See* Gov't Ex. 20 at DOJ 268. Together these public documents establish that Plaintiffs should have known a claim existed when the EPA issued the March 31, 1999 ROD.

For these reasons, the court has determined that any claim for a regulatory taking, based on the EPA's March 31, 1999 remediation plan for the OMS, accrued on March 31, 1999, when the EPA issued the ROD and rendered the takings claims alleged in the Amended Complaint barred by 28 U.S.C. § 2501.

4. In The Alternative, Plaintiffs Did Not Own The Property At Issue On March 31, 2000, When The Alleged Taking Claims Accrued.

Neither of the Plaintiffs owned the property at issue on March 31, 1999, when the EPA issued the ROD requiring the installation of a sand cap and log boom in the OMS. In fact, on that date, Mr. Dutra was the sole owner of the property. The property was not acquired by CRV until November 8, 2002. *See* Gov't Ex. 1 at DOJ 1 (10/29/2002 Deed). And, it was not until October 20, 2004 that CRV transferred title of the property to Mr. Voorhees. *See* Gov't Ex. 2 at DOJ 4. Without "a valid property interest at the time of the taking," Plaintiffs have no cause of action for

compensation under the Fifth Amendment of the United States Constitution. *See Ciengega Garden v. United States*, 331 F.3d 1319, 1328 (Fed. Cir. 2003) ("For any Fifth Amendment takings claim, the complaining party must show it owned a distinct property interest at the time it was allegedly taken, even for regulatory takings."); *see also Wyatt v. United States*, 271 F.3d 1090, 1096 (Fed. Cir. 2001) ("It is axiomatic that only persons with a valid property interest at the time of the taking are entitled to compensation."). In addition, it is irrelevant that Mr. Dutra attempted to assign any claims against the Government to CRV. *See* Gov't Ex. 29 at DOJ 472. "It is well established . . . that the Assignment of Claims Act prohibits the voluntary assignment of a compensation claim against the Government for the taking of property." *United States v. Dow*, 357 U.S. 17, 20 (1958); *see also* 31 U.S.C. § 3727(b) ("An assignment may be made only after a claim is allowed, the amount of the claim is decided, and a warrant for payment of the claim has been issued."). Accordingly, Plaintiffs also do not have standing to assert the takings claims alleged in the Amended Complaint.

IV. CONCLUSION.

For the above reasons, the Government's April 15, 2008 Motion is granted in part and denied in part, as moot. Plaintiffs' April 11, 2008 Motion is denied. The January 23, 2008 Amended Complaint is dismissed, with prejudice.

IT IS SO ORDERED.

s/ Susan G. Braden
SUSAN G. BRADEN
Judge

Appendix C–1

In the United States Court of Federal Claims

No. 06-660 L

CRV ENTERPRISES, INC. AND
C. RYAN VOORHEES,

JUDGMENT

v.

THE UNITED STATES

Pursuant to the court's Published Memorandum Opinion and Final Order of Dismissal, filed April 30, 2009, granting in part and denying in part, as moot, the Government's April 15, 2008 Motion, and denying Plaintiffs' April 11, 2008 Motion,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the January 23, 2008 Amended Complaint is dismissed, with prejudice.

John S. Buckley
Acting Clerk of Court

May 7, 2009

By: s/Lisa L. Reyes
Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is $455.00.

Appendix D–1

RECORD OF DECISION

McCORMICK & BAXTER SUPERFUND SITE

Stockton, California

March 31, 1999

U.S. ENVIRONMENTAL PROTECTION AGENCY

REGION 9

Appendix D–2

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7.0 DESCRIPTION OF ALTERNATIVES

The FS evaluated a range of general response actions and remedial technologies for groundwater, soil and sediment in order to develop remedial alternatives for the Site. A brief narrative summary of the alternatives is presented below; each alternative is described in detail in the FS report.

7.1 Soil Remedial Action Alternatives

Access rights that allow for monitoring, operation and maintenance of each soils remedy and land use restrictions that prohibit interference with the selected remedy are a component of all of the vadose zone soil alternatives. In addition, all of the alternatives that involve capping include a long-term monitoring and maintenance program to ensure the integrity of the cap. Soil remediation costs are presented in terms of low-end and high-end costs.

Alternative S-1: No Action

No action would be taken at the Site to address soil contamination. This represents baseline conditions at the Site and is used for comparison with the other vadose zone soil alternatives.

Cost: $0

Alternative S-3: Capping-In-Place

An asphaltic concrete cap would be placed over the entire Site. This would make the stormwater ponds unnecessary, so the ponds would also be backfilled and capped. This type of cap consists of a layer of asphaltic concrete (A/C) over an aggregate (base rock) layer and a 1-3 ft protection layer of clean imported fill.

Total Present Worth Cost: $3.3M - $5.1M (Capital: $2.8M -$4.1M; 30 Year O&M: $0.5M -$1M)

Alternative S-4: Excavation of Subarea X Soils: Consolidation and Capping in Subarea Y

Subarea X soils (37,130 cubic yards (cy)) would be excavated and moved to Subarea Y. The stormwater ponds would be backfilled with the excavated soils and graded. The consolidated Subarea X and Y soils would then be covered with an A/C cap.

Total Present Worth Cost: $3.4M -$5.3M (Capital: $3.1M -$4.7M; 30 Year O&M: $0.3M -$0.6M)

Alternative S-5: Excavation of Subarea X Soils and Off-Site Disposal: Capping of Subarea Y

Similar to S-4, this alternative would also excavate Subarea X soils. However, rather than moving these soils to Subarea Y, these soils would be transported to a permitted hazardous waste landfill for off-Site treatment (if necessary) and disposal.

As in S-4, an A/C cap would be installed over Subarea Y, including the stormwater ponds. Because the

quantity of Subarea Y soil (212,549 cy) is considered too large a volume for cost-effective off-Site disposal, it would be contained on the Site as in the previous alternatives.

Total Present Worth Cost: $16.1M - 26M (Capital: $15.8 - $25.4M; 30 Year O&M: $0.3 -$0.6M)

Alternative S-6: Excavation and Ex-Situ Solidification/Stabilization of Subareas X and Y: Backfilling and Capping in Subarea Y

Subarea X and Y soils would be excavated and treated using ex-situ solidification/stabilization. Site-specific treatability studies indicated that S/S would be effective for both organic and inorganic contaminants in vadose zone soils. The treated soil would be used as backfill in Subarea Y, including the stormwater ponds, and the area would be capped as in S-4 and S-5.

Total Present Worth Cost: $22.6M - 39M (Capital: $22.4 - $38.6M; 30 Year O&M: $0.3 -$0.6M)

7.2 Groundwater/NAPL Remedial Action Alternatives

Although EPA's general goal for groundwater cleanup is to restore aquifers to their beneficial uses, there are currently no proven technologies that can achieve this at the McCormick & Baxter Site. The groundwater alternatives evaluated in this ROD are for an interim remedy to contain the groundwater contamination plume until EPA completes further groundwater studies and selects a final groundwater remedy.

EPA will evaluate developing in-situ steam injection and other thermal technologies that have the potential to enhance DNAPL recovery at the Site. The results of these technologies have been promising at some sites. While EPA acknowledges that there are implementability, effectiveness and cost concerns related to the potential use of in-situ thermal technologies at the M&B Site, EPA will evaluate such technologies further during the Remedial Design (RD) phase to determine if they are an appropriate final groundwater remedy for the Site.

Under the interim remedy, the preferred methods for treating and disposing of the extracted groundwater is the same for both Alternative GW/N-3 and GW/N-4. Extracted groundwater would undergo an on-Site "treatment train" of oil/water separation to remove NAPL, biotreatment, filtration and carbon adsorption. The preferred disposal option for the treated groundwater is discharge to surface water; if the discharge is off-Site, the discharge with be subject to a Clean Water Act National Pollutant Discharge Elimination System (NPDES) permit. This option may be used in combination with re-use for irrigation or industrial purposes near the Site, if local users can be located. The NAPL that was extracted and separated would be treated and disposed off-Site or recycled, if technically feasible and cost-effective.

Alternative GW/N-1: No Action (With Monitoring)

No action would be taken at the Site to address groundwater and DNAPL contamination. Groundwater monitoring would be conducted for a minimum of 30 years. This represents baseline

conditions at the Site and is used for comparison with the other groundwater alternatives.

Total Present Worth Cost: $2.1M (30 year groundwater monitoring cost)

Alternative GW/N-3: Groundwater Extraction/ Treatment with Incidental DNAPL Removal

This alternative uses hydraulic control of the groundwater plume to prevent further movement of contaminated groundwater beyond its present limits. The system would use an estimated 33 extraction wells pumping at a total rate of 235 gallons per minute (gpm). The exact number of extraction wells to be installed would be determined during the remedial design. DNAPL would be removed incidentally with groundwater. Extracted groundwater and DNAPL would be treated and disposed as described above.

Total Present Worth Cost: $13.4M (Capital: $2.5M; 30 Year O&M: $10.9)

Alternative GW/N-4: Groundwater Extraction/Treatment with Systematic DNAPL Removal

Like GW/N-3, this alternative also relies on hydraulic control. This system would pump at the same rate as GW/N-3, but it would use more extraction wells (43). The exact number of extraction wells to be installed would be determined during the remedial design. In addition, dedicated DNAPL extraction wells would be installed at known and potential DNAPL source areas to maximize DNAPL recovery. Extracted groundwater and DNAPL would be treated and disposed as described above.

Total Present Worth Cost: $15.8M (Capital: $2.7M; 30 Year O&M: $13.1M)

7.3 Sediment Remedial Action Alternatives

As contamination in the MTH subarea of Old Mormon Slough is shallow, scattered and at relatively low concentrations, all of the sediment alternatives (except No Action) assume that the MTH subarea would not be actively remediated. The remedy for the MTH subarea would rely on access restrictions (warning signs or log booms) and/or, to the extent available, land use restrictions that run with the land to prevent interference with, and to ensure access to monitor, operate and maintain, the remedy. Naturally-occurring sediment accumulation and natural attenuation would reduce the exposure to and/or the contaminant concentrations over time in this area of the slough.

All of the sediment alternatives that involve capping include a long-term monitoring and maintenance program to ensure the integrity of the cap.

Alternative SD-1: No Action (With Monitoring)

No action would be taken at the Site to address sediment contamination. This represents baseline conditions in Old Mormon Slough and is used for comparison with the other sediment alternatives. Monitoring of sediment and biota would be conducted.

Total Present Worth Cost: $0.326M (30 year monitoring cost)

Alternative SD-2: In-Situ Capping

Approximately three-fourths of Old Mormon Slough would be capped with a minimum of two feet of clean sand to isolate the contaminated sediment from organisms in the slough and prevent the contaminants from being released into the surface water. Localized armoring of the cap with rip-rap and an underlying gravel filter layer would be installed in areas found to be susceptible to erosion.

Total Present Worth Cost: $1.8M (Capital: $1.2M; 30-Year O&M: $0.6M)

Alternative SD-3: Dredging and Confined Disposal: Partial Capping

The most heavily contaminated sediment in the OWP and CPA subareas of Old Mormon Slough would be dredged to the maximum depth feasible, estimated at approximately 8 feet below the mudline. A confined disposal facility (CDF) would be constructed by placing a sheet piling wall across the eastern end (approximately one-third) of the slough. The dredged material would be placed behind the wall and the area capped over. Remaining areas of deeper contamination that may be exposed by the dredging would be capped.

Total Present Worth Cost: $2.9M (Capital: $2.5M; 30-Year O&M: $0.4M)

Alternative SD-4: Dredging and Off-Site Disposal: Partial Capping

Sediment would be dredged from the OWP, CPA and END subareas of Old Mormon Slough. It would be dewatered on-Site and transported for off-Site treatment (if necessary) and disposal at a permitted hazardous waste facility. Remaining areas of deeper contamination that may be exposed by the dredging would be capped.

Total Present Worth Cost: $351M (Capital: $350M; 30-Year O&M: $0.6M)

Alternative SD-5: Dredging Treatment: Partial Capping

Sediment would be dredged as in SD-4. The dredged material would be dewatered and treated on-Site by solvent extraction to remove the organic contamination, then solidified to address the remaining metals contamination. The treated material would be disposed of in the western portion of the Site, assuming sufficient space was available there. Remaining areas of deeper contamination that may be exposed by the dredging would be capped.

Total Present Worth Cost: $67.7M (Capital: $67.1M; 30-Year O&M: $0.6M)

* * * *

10.0 SELECTED REMEDY

10.1 Cleanup Standards

The NCP (40 CFR 300.430(e)(2)(i)) requires that the development of remediation goals consider Applicable or Relevant and Appropriate Requirements ("ARARs") and establish acceptable exposure levels that are protective of human health and the environment. (See Section 9.0) Chemical specific ARARs may be used to establish cleanup standards. In the absence of such ARARs, TBC criteria may be used to develop cleanup standards. Where chemical-specific ARARs are not protective or are not available, site-specific, risk-based estimates of concentrations that are predicted to be protective of human health and the environment are used to develop numerical cleanup standards. Reference concentrations measured in areas assumed to be unaffected by the M&B Site may also be used to develop numerical cleanup standards for soil and groundwater.

The NCP states that for carcinogenic contaminants, "acceptable exposure levels are generally concentration levels that represent an excess upper bound lifetime cancer risk to an individual of between 10^{4} and 10^{6}. For non-carcinogens, a hazard index (HI) of one or less is considered an acceptable exposure level. **Table 6** lists the specific cleanup standards for soils and sediment at the M&B Site. There are no cleanup standards listed for groundwater because a final groundwater remedy is not being selected at this time.

10.1.1 Soils

The soils cleanup standards, with the exception of dioxin, are set to achieve a Site-wide excess cancer risk no greater than a 10^{5} risk for industrial workers at the Site based on exposure to carcinogenic COCs in surface and near-surface soils (i.e., soils up to five feet below ground). They address the risk from direct contact with soil at the surface or during shallow excavation.

Since no ARARs are available for the soil contaminants at the M&B Site, soil cleanup standards have been selected on the basis of the human health assessment performed in accordance with 40 CFR 300.340(e)(2)(i) and guidelines in EPA's *Risk Assessment Guidance for Superfund* ("RAGS").

Carcinogenic PAHs: The soil cleanup standard selected for carcinogenic PAHs at the M&B Site is 3.6 milligrams/kilogram of soil (mg/kg), expressed as benzo(a)pyrene equivalents. This cleanup standard represents a $1x10^{5}$ excess lifetime cancer risk resulting from multi-pathway contact with benzo(a)pyrene in surface soils for a worker exposure scenario consistent with RAGS (U.S. EPA, 1989; U.S. EPA, 1991). The selected standard is higher than the preliminary cleanup standard presented in the Proposed Plan and FS report because of a re-evaluation of the cancer potency and dermal exposure potential of benzo(a)pyrene.

Pentachlorophenol: The soil cleanup standard selected for pentachlorophenol in surface soils at the M&B Site is 150 mg/kg. This cleanup standard represents a $1x104^{5}$ excess lifetime cancer risk resulting from

multi-pathway contact with pentachlorophenol in surface soils for a worker exposure scenario consistent with RAGS (U.S.EPA, 1989; U.S. EPA, 1991). The selected standard is higher than the preliminary cleanup standard presented in the Proposed Plan and FS report because of changes in standard Superfund risk assessment assumptions concerning a worker's dermal exposure to surface soil contaminants.

Arsenic: The soil cleanup standard selected for arsenic in surface soils at the M&B Site is 30 mg/kg. This cleanup standard represents a $1x10^{-5}$ excess lifetime cancer risk resulting from multi-pathway contact with arsenic in surface soils for a worker exposure scenario consistent with RAGS (U.S. EPA, 1989; U.S. EPA, 1991). The selected standard is higher than the preliminary cleanup standard presented in the Proposed Plan and FS report because of changes in standard Superfund risk assessment assumptions concerning a worker's dermal exposure to surface soil contaminants.

Naphthalene: The soil cleanup standard selected for naphthalene, a non-carcinogenic PAH, in surface soils at the M&B Site is 190 mg/kg. This cleanup standard represents a soil concentration to which workers may be exposed on a daily basis without experiencing an adverse health effect during their lifetime, based on a multi-pathway worker exposure scenario consistent with RAGS (U.S. EPA, 1989; U.S. EPA, 1991). The selected standard is lower that the preliminary cleanup standard presented in the Proposed Plan and FS report because of a change in the toxicity assessment of naphthalene inhaled via entrainment in fugitive dust.

Other Non-Carcinogenic PAHs: The soil cleanup standards selected for the remaining noncarcinogenic PAH contaminants of concern at the M&B Site are: 1,100 mg/kg for acenaphthene, 57 mg/kg for anthracene, 900 mg/kg for fluorene and 1,000 mg/kg for pyrene. These cleanup standards represent a compromise between the predicted soil saturation levels for these noncarcinogenic PAHs and the soil concentrations to which workers may be exposed on a daily basis without experiencing and adverse health effect during their lifetime, based on a multi-pathway worker exposure scenario consistent with RAGS (U.S. EPA, 1989; U.S. EPA, 1991). Soils remediated to these cleanup standards may contain some free PAHs, but are not expected to present any health risk to current or future workers on-Site.

Dioxin: EPA's "Approach for Addressing Dioxin in Soil at CERCLA and RCRA Sites," OSWER Directive 9200.4-26, April 13, 1998, was taken into consideration in developing preliminary soil remediation goals for dioxin. A preliminary remediation goal of 1 ppb (TEQ) was selected for soil at the Site. A final soil cleanup standard of 1 ppb (TEQ) dioxin was selected for the Site based on an evaluation, as documented in this ROD, of a range of cleanup alternatives using EPA's nine remedy selection criteria. EPA considers the 1 ppb (TEQ) cleanup standard appropriate for this Site because of the presence of other carcinogenic COCs in addition to dioxin. As documented in the Administrative Record, the final soil cleanup standard of 1 ppb (TEQ) for soil at this Site is considered protective for human health and the environment, based on current and future use of the Site, and reflects an excess cancer risk of 2.5×10^{4}.

Soil cleanup standards for the COCs are shown in Table 6.

[Table omitted]

10.1.2 Groundwater

Under the interim groundwater action, treatment standards will be set for the extracted groundwater based on its end use. If used for irrigation or industrial purposes at or in the vicinity of the Site, treatment standards will be determined by the actual end use. If discharged to surface water under NPDES, the groundwater will be required to meet the ARARs for surface water discharge identified in this ROD. These standards will apply at the point of discharge and will be protective of human health and the surface water environment.

10.1.3 Sediment

In the absence of chemical-specific sediment ARARs for the COCs, risk-based sediment cleanup standards were derived based on environmental risk. The Ecological Risk Assessment ("ERA") defined values for maximum sediment concentration ("MSC") cleanup levels for the COCs at the M&B Site. The MSCs are dry weight concentrations that are predicted to be protective of aquatic biota based on literature values and toxicity tests conducted for the M&B Site. For most of the COCs, several approaches were used to calculate these maximum concentrations, including sediment quality guidelines, equilibrium partitioning models, contaminant mixtures models, correlations with sediment

toxicity, and sediment quality criteria. Not all approaches could be applied to each COC.

Sediment cleanup standards for PAHs are for total PAHs because they are based on ecological, not human health, risks. The preliminary risk-based sediment cleanup standards for total PAHs that were presented in the Proposed Plan varied for each subarea of Old Mormon Slough based on the total organic content (TOC) of the sediment in each subarea. The preliminary numbers were based on a method that estimated the availability of the compounds to organisms and their resulting toxicity (the greater the organic content, the fewer PAHs that are available for biological uptake). The preliminary cleanup standards ranged from 3.6 mg/kg at the mouth of the slough to 12 mg/kg at the east end of the slough. To make the units consistent for implementation of the remedy, the final sediment cleanup standard for total PAHs selected in this ROD is presented as a single number for all of Old Mormon Slough: 333 mg/kg (dry weight, organic carbon normalized). The dioxin sediment cleanup standard in the Proposed Plan was printed with incorrect units. The correct units for dioxin are ng/kg, not ug/kg. Sediment cleanup standards for total PAHs and dioxin are shown in Table 6.

[Table omitted]

10.2 Description of the Selected Remedy

10.2.1 Vadose Zone Soil Remedy

1.2.1.1 Selected Remedy (Alternative S-4)

The selected vadose zone soil remedy consists of excavating all the Subarea X contaminated soil exceeding soil cleanup standards, moving them to Subarea Y and covering the consolidated Subarea X and Y soils with a cap. The components of this remedy include:

- Site clearance and debris removal
- Excavation of Subarea X soils
- Initial grading of the area to be capped
- Backfilling of Subarea X excavations with clean import fill
- Backfilling and grading of the stormwater ponds with a portion of excavated Subarea X soils (approximately 10,000 cy)
- Consolidation of remaining Subarea X soils in Subarea Y, and cap construction over the contaminated soil
- Cap maintenance
- Institutional controls

Under this remedy, approximately 37,500 cy in-place of the soil from Subarea X would be excavated. Excavation of the shallow soils (approximately 30,800 cy) will be performed using dozers, sectionally excavating six inches at a time up to a maximum of one foot. Deeper hotspots, approximately 6,700 cy in-place in Subarea X, would be excavated using a combination of excavators, scrapers and backhoes. If

required, the excavation perimeter would be sloped to maintain stability. It is not anticipated that shoring would be required for any Subarea X excavations. In areas where groundwater might be encountered during excavation, dewatering would be avoided by backfilling the excavation using clean imported fill on the same day.

Excavation of Subarea X would be conducted in several stages. After completion of one stage, the excavation would be backfilled using import fill. The backfilling material would be placed in lifts not more than 8 inches in thickness and compacted to 90% of maximum dry density. Since most of the COCs are co-located, segregation of the soil by contaminant type would not be feasible. The excavated soil from each stage of the excavation would be temporarily stockpiled. A portion of the stockpiled soils will be backfilled into the storm water ponds in Subarea Y, after dewatering the ponds if necessary. After the pond areas are backfilled and compacted, the rest of Subarea Y would be graded. The remainder of the stockpiled soils would then be transported to and spread over the proposed cap area in Subarea Y. Several feet of clean soil will be placed under the pavement and the aggregate layer as a protective layer. As a result of the consolidation and capping in Subarea Y, the elevation of Subarea Y in the consolidation area would be raised by 3 or 4 feet, although this could be less depending on the degree of debris removal from Subarea X soils. If this elevation difference between Subareas X and Y present a problem for the future use of the Site, this grade change can be addressed by raising the elevation of Subarea X with clean import soil.

The cap would be maintained regularly to minimize cracks and degradation. This remedy would include all or some of the following institutional controls: Site access controls (fencing and controlled gates); land use restrictions such as restricting the end use of the Site to appropriate industrial uses (and prohibiting other uses); and proprietary and/or governmental land use restrictions such as prohibiting, limiting or controlling conditions of excavation of any impacted soil during future construction, providing appropriate notice (in land records and otherwise) that hazardous wastes remain at the Site, and prohibiting other activities that could cause a potential threat to human health and the environment. Institutional controls for Subarea X would need to be less stringent than for Subarea Y. Fencing, controlled entry gates and restrictions on excavating to certain depths would not be needed for this portion of the Site because no contaminated soil would remain in Subarea X.

The total cost for this remedy is estimated at $3.4M - 5.3M (Capital: $3.1M - 4.7M; 30-year O&M: $0.3 - 0.6M). The time to implement the soil remedy is estimated at eight months.

10.2.1.2 Contingency Remedy (Alternative S-3)

The contingency vadose zone soil remedy consists of capping-in-place of the entire Site to address the exposure pathways of direct contact, inhalation and ingestion of contaminated surface soils. Capping of the Site will also lessen or prevent leaching of contaminants from Site soils via infiltrating water, although this is not considered a significant contributor to ongoing groundwater contamination at the M&B Site.

The total estimated cap area is 33 acres. Since shallow (0 - 1 ft bgs) contamination is present throughout the entire Site, a single cap is proposed for the entire Site rather than several individual caps.

The components of this remedy include:

- Site clearance and debris removal
- Initial grading of the area to be capped
- Backfilling and grading of storm water ponds with clean import soil
- Cap construction over the entire Site
- Cap maintenance
- Institutional controls

An asphaltic concrete (A/C) cap is proposed for the Site. A/C caps consist of a protection layer of 1 to 3 feet of clean fill, compacted to 90% of its dry density, placed over the treated or untreated soils depending on the alternative. Above the protection layer is a 6 to 9 inch aggregate layer, which is overlain by a 2 to 3 inches of A/C. Design factors such as the thicknesses of the protective zone, aggregate layer, and A/C layer will be determined based on the end use of the Site. Typically, a 6-inch aggregate layer followed by 2-inch A/C layer is utilized for light-traffic parking areas, and an 8-inch aggregate layer with a 3- to 4-inch A/C layer is utilized for areas of moderate traffic. Portions of the Site can be capped using different grades (thicknesses) of A/C caps if necessary for the future use of the Site. For cost estimating purposes, it is assumed that the cap consists of 2 feet of protective zone, 6 inches of aggregate layer, and 2 inches of A/C layer. The surface of the cap would be sloped 1 to 2% for drainage.

Stormwater catch basins would be provided to collect the storm water.

The soils contingent remedy would be triggered if EPA determines that a potentially responsible party or a prospective purchaser has sufficiently agreed in writing to undertake the contingency soils remedy as described in this ROD, including long-term operations and maintenance and compliance with use restrictions regarding the soils remedy. Because this remedy has been selected to allow for Site redevelopment, the actual design of the final Site cap will be determined by the future use of the Site, as approved by EPA to ensure protection of human health and the environment.

The cap would be maintained regularly to minimize cracks and degradation. The institutional controls that are part of the selected soil remedy include Site access and land use restrictions as described for the selected remedy

The total cost for this remedy is estimated at $3.3M - $5.1M (Capital: $2.8M - $4.1M; 30-year O&M: $0.5 - 1M). The time to implement the remedy is estimated at eight months.

10.2.2 Groundwater Remedy (Alternative GW/N-4)

The objective of the selected interim groundwater remedy is to contain the groundwater contaminant plume to prevent migration of Site: COCs in the downgradient direction and to prevent further degradation of the aquifer beneath the Site. The remedy also includes systematic removal of NAPL

using extraction wells located in NAPL-impacted areas to the extent feasible.

This remedy includes the following components:

- Extraction of groundwater from an estimated 16 A Zone; 12 B Zone; 9 C Zone; and 4 D Zone and 2 E Zone wells to contain the contaminant plume

- Systematic DNAPL extraction using dedicated wells and LNAPL removal using a skimmer in Well A-8

- On-Site treatment of groundwater through the preferred groundwater treatment train

- Disposal of treated groundwater through a combination of NPDES discharge into surface water and reuse for irrigation or industrial uses

- Off-Site recycling. or treatment/disposal of extracted NAPL

- Long-term monitoring of groundwater and NAPL

The total groundwater extracted under this remedy is estimated at approximately 235 gpm. Under the proposed extraction scenario, lateral capture of the contaminant plume is achieved. In the A-Zone, the vertical hydraulic gradient downward towards the B-Zone will persist. A neutral vertical gradient is achieved between the B-, C- and D-Zones. Vertical capture of DNAPL would also be achieved. Two

E-Zone wells would be included (if indicated by modeling to be conducted during the remedial design phase), one at the southern Site perimeter and one outside the property boundary near well OFS-4E, to prevent downgradient contaminant migration in the deep zones. Each well is expected to operate at 15 gpm. The extraction regime could be modified by increasing the pumping rates in the proposed wells, should expanded capture be needed in the A-, B-, C- and D-Zones. The exact number of extraction wells will be determined during the remedial design.

Dedicated DNAPL extraction wells would be installed in areas where significant quantities of DNAPL have been identified, such as the location of the oily waste ponds and the central processing area. Extracted groundwater would be treated on the M&B Site property. The process steps for treatment of extracted groundwater are expected to include oil/water separation to remove NAPL, biotreatrnent, filtration, and carbon adsorption. The components of the system will be determined during the project remedial design (RD) phase. The actual components will be subject to modification during operation, based upon the actual flow rates and chemistry of the extracted groundwater (both of which may vary significantly over time). Additional treatability studies may be necessary during RD. Modifications to the process train may be necessary as the chemistry of the influent may alter significantly over time.

Monitoring of water levels and water quality will be an integral part of the extraction and treatment system. The monitoring program will be designed to ensure that groundwater gradients are controlled and that

satisfactory capture of the groundwater contamination plume is maintained. The monitoring program will also verify whether groundwater contaminant plunie reductions are occurring as a result of groundwater extraction and provide information that may be used to adjust the extraction and treatment systems for optimum cost-effective performance over time.

The total cost for this remedy is estimated at $15.8M (Capital: $2.7M; 30-year O&M; $13.1M). The time to implement the remedy, including design, regulatory review, procurement and construction, is estimated at 24 months.

10.2.3 Sediment Remedy (Alternative SD-2)

The selected sediment remedy consists of in-situ capping of contaminated Old Mormon Slough sediments in order to isolate areas of principal threat waste (approximately three-fourths of the slough) by blanketing them with a minimum of 2 ft of clean fine sand. The cap materials would be armored with rip-rap and gravel filter layer where needed to prevent erosion. The portion of the slough to be capped would run from just north of the oily waste ponds (OWP) area to the east end of the slough. The dimensions of the cap are estimated at approximately 2,330 ft long by approximately 167 ft wide. The cap would cover an estimated 8.8 acres. This portion of the slough contains nearly all of the PAH and dioxin concentrations exceeding the preliminary sediment cleanup standards and accounts for an estimated 99.5% of the mass of accessible (<8 ft deep) PAH contamination and 98% of the mass of dioxin contamination. The estimated volume of clean fine

sand needed for cap material (including a 10% safety factor), is estimated at 31,200 yd.

As noted earlier, the mouth of Old Mormon Slough is considered a low-level threat area. The two isolated sample locations, or "hot spots," where concentrations exceeded sediment cleanup numbers would be addressed by the use of institutional controls to limit navigational access to the slough; provide more warning signs; limit future use of Old Mormon Slough to appropriate uses; and control future dredging of the slough to prevent disturbance of residual sediment contamination in the mouth of the slough. Environmental monitoring would be conducted to assess the progress of natural attenuation processes in the MTH area. The rationale for not capping the MTH area is that there is no obvious spatial continuity between the two "hot spots"; because of their small size, they would be difficult to locate again and are difficult to define for implementation of any active remedial action such as capping or dredging; they are shallow compared to the rest of the slough; and they are located in a portion of the slough that historically has been occasionally used for barge traffic.

Similar institutional controls would be implemented for the capped portion of Old Mormon Slough to prevent inadvertent erosion or other disruption of in-situ sediment cap materials that would cause exposure of more highly contaminated sediment under the cap. Short-term and long-term monitoring would be performed to assess the integrity and maintenance needs of the sediment cap.

The estimated cost for a 90% sand/10% armored cap combination is $1.8M (Capital: $1.2M; 30-Year O&M: $0.6M). The time to design and implement the sediment remedy is estimated at seven to eight months.

* * * *

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IN THE
Supreme Court of the United States

CRV ENTERPRISES, INC. AND C. RYAN VOORHEES,
Petitioners,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF THE CATO INSTITUTE, REASON FOUNDATION, CENTER FOR CONSTITUTIONAL JURISPRUDENCE, AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does the Takings Clause have an expiration date?

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*[1]

The Federal Circuit decided that CRV Enterprises lacked standing to challenge an Environmental Protection Agency (EPA) decision restricting access to its property as a regulatory taking because CRV purchased the property after the EPA issued that decision. *CRV Enters. v. United States*, 626 F.3d 1241, 1250 (Fed. Cir. 2010). The Federal Circuit's decision amounts to a *per se* bar to regulatory takings claims by plaintiffs who take title to property after a regulation is enacted. This decision cannot be reconciled with *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), which held that a Fifth Amendment Takings Clause claim cannot be barred simply because the property owner took title after the challenged regulation was enacted.

In *Palazzolo*, the Supreme Court explained the fundamental principle that "a regulation that otherwise would be unconstitutional absent compensation is not transformed [into one that is constitutional] by mere virtue of the passage of title." *Palazzolo*, 533 U.S. at 629. The Supreme Court rejected the idea that "the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part, and no entity or person, aside from the *amici curiae*, its members, and its counsel, made any monetary contribution toward the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2(a), *amici* certify that counsel of record for both parties received timely notice of our intent to file this brief, and have consented to its filing.

extreme or unreasonable" because such a rule would "put an expiration date on the Takings Clause." *Id.* at 627. Here, the Federal Circuit abrogated *Palazzolo* because it barred CRV's action by enforcing just such an expiration date.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Toward those ends, Cato publishes the annual *Cato Supreme Court Review* and files *amicus curiae* briefs with the courts. This case is of central concern to Cato because it implicates Fifth Amendment protections from regulatory takings and is a departure from foundational Supreme Court decisions protecting those rights.

Reason Foundation is a national, nonpartisan, and nonprofit public policy think tank, founded in 1978. Reason's mission is to promote liberty by developing, applying, and communicating libertarian principles and policies, including free markets, individual liberty, and the rule of law. Reason advances its mission by publishing *Reason* magazine, as well as commentary on its websites, and by issuing policy research reports that promote choice, competition, and a dynamic market economy as the foundation for human dignity and progress. Reason also communicates through books and articles in newspapers and journals, and appearances at conferences and on radio and television, and Reason personnel consult with public officials at the national, state, and local level on public policy issues. To further Reason's commitment to "Free Minds and Free Markets," Reason selectively participates as

amicus curiae in cases that raise significant constitutional issues involving property rights.

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose mission is to restore the principles of the American Founding to their rightful and preeminent authority in our national life, including the proposition expressed in the Fifth Amendment that private property can be taken only for public use, and then only upon payment of just compensation. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as *amicus curiae* before this Court in several cases of constitutional significance, including *Kelo v. City of New London*, 545 U.S. 469 (2005), and *Rapanos v. United States*, 547 U.S. 715 (2006).

The National Federation of Independent Business is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents over 300,000 businesses, and its membership ranges from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest. The NFIB Legal Center frequently files *amicus* briefs in cases that impact small businesses.

STATEMENT OF THE CASE

This case centers on a parcel of land adjacent to a narrow strip of navigable water—a "slough"—in the Central Valley city of Stockton, California. The slough is connected to a waterway that eventually leads to the San Francisco Bay. As with any waterfront property, ownership of the parcel adjacent to the slough includes the right to access the water. California courts have long recognized that a littoral owner's access to the shore adjacent to his property is a property right. *Marks v. Whitney*, 6 Cal. 3d 251, 262-63 (1971) (citing *S.F. Sav. Union v. R. G. R. Petroleum Co.*, 144 Cal. 134 (1904); *Yates v. Milwaukee*, 77 U.S. 497 (1871)). The facts that follow provide the context for the EPA's taking of that property right from CRV.

From 1942 to 1990, before either party to this suit was involved, a wood-preserving plant operated on the slough's southern shore. The plant released chemicals, some of which settled at the bottom of the slough. Due in part to these sediments, in 1992 the EPA added the former plant site and the sediment to its Superfund National Priorities List. *CRV Enters.*, 626 at 1243-44.

After studying the site and issuing some draft reports, the EPA issued a final ruling, a Record of Decision ("ROD"), in 1999. The ROD provided for capping the slough and restricting access to it. In 2000, after the EPA issued its ROD, CRV began discussions with the owner of a parcel across the slough from the site once occupied by the wood-preserving plant. CRV hoped to develop that parcel and others it already controlled into a mixed use development including a marina, boat slips,

restaurants, lodging, storage, sales, and service facilities. CRV knew of the ROD when it was considering its purchase. In 2002, CRV finalized its purchase of the property, including the littoral rights that were necessary for CRV's planned development. *Id.* at 1244-45.

In 2003, CRV filed an inverse condemnation claim against the United States, arguing that the EPA's planned remediation was a taking. Because no work had been done on the remediation, the parties agreed to dismiss without prejudice for lack of ripeness. *Id.* at 1245.

In 2006, the EPA installed a sand cap and log boom obstructing CRV's access to the slough and posted signs including "NO ENTRY." *Id.* at 1245. Shortly thereafter, CRV sued the United States in the Court of Federal Claims, arguing that these measures denied CRV's access to the shoreline adjacent to its property and therefore constituted a taking of its littoral rights. That court dismissed the claim for various reasons, including that CRV lacked standing because it did not own the property at the time the ROD was issued. *Id.* at 1245; *CRV Enters. v. United States*, 86 Fed. Cl. 758 (2009). CRV appealed that ruling, and the Federal Circuit affirmed, in part based on the conclusion that CRV lacked standing. The Federal Circuit explained that any regulatory takings claim was owned by the prior owner and such a claim brought by CRV "is barred because [CRV] did not own a valid property interest at the time of the alleged regulatory taking." *CRV Enters.*, 626 F.3d at 1250.

REASON FOR GRANTING THE PETITION

The Federal Circuit faced an important question of law and issued a ruling that conflicts with this Court's jurisprudence and with the decisions of other federal courts. *CRV Enterprises* and the Ninth Circuit's recent ruling in *Guggenheim* exacerbate a growing circuit split and departure from this Court's precedent. This Court should provide much-needed doctrinal certainty by reaffirming *Palazzolo*.

Here, the Federal Circuit's ruling as to CRV's regulatory takings claim—that a party that took title after a regulation was enacted has no standing to challenge that regulation—directly contravenes this Court's holding in *Palazzolo*. It also implicates the question that *Palazzolo* answered in the negative: Does the Takings Clause have an expiration date?

In *Guggenheim v. City of Goleta*, No. 06-56306, 2010 U.S. App. LEXIS 25981 (9th Cir. Dec. 22, 2010), the *en banc* Ninth Circuit decided that a property owner could not prevail on his regulatory takings claim because he had purchased the property after the regulation in question was enacted. *Guggenheim* also has a pending Petition for Writ of Certiorari, *Guggenheim v. City of Goleta*, 2010 U.S. App. LEXIS 25981 (9th Cir. 2010), *petition for cert. filed* (U.S. Mar. 14, 2011) (No. 10-1125), which *amici* also supported in separate briefs.

ARGUMENT

I. THE FEDERAL CIRCUIT RULING SIGNIFICANTLY DIMINISHES PRIVATE PROPERTY RIGHTS.

This case presents several important issues. The Court should consider the following: (1) when post-enactment purchasers are *per se* denied standing to challenge regulation, government power expands at the expense of private property rights; (2) a rule under which pre-enactment owners have superior rights to subsequent title-holders threatens to disrupt real estate markets; (3) the Federal Circuit's decision in *CRV Enterprises* abrogates the Supreme Court's decision in *Palazzolo*; and (4) this case—as well as *Guggenheim*—indicates the need for the Supreme Court to settle spreading confusion about *Palazzolo*. We begin by explaining why the Court should underscore its disapproval of a rule that would deny subsequent owners their fundamental right to challenge government interference with their property.

A. The Federal Circuit Placed an Expiration Date on the Takings Clause: the Date Title Changes Hands.

The Fifth Amendment mandates that government take property only for public use and that the affected property owner receive just compensation. U.S. CONST. AMEND. V; *Kelo*, 545 U.S. at 477. Courts rarely side with property owners when government exercises eminent domain—"the despotic power"—therefore it is all the more important that owners be properly compensated. *See generally Vanhorne's Lessee v. Dorrance*, 2 U.S. 304, 311 (1795); *see also Penn Cent. Transp. Co. v. City of New York*, 438 U.S.

104 (1978); *Tahoe-Sierra Pres. Council v. Tahoe Reg. Planning Agency*, 535 U.S. 302, 335-36 (2002).

The most direct taking occurs when government transfers ownership of land from one party to another—either to the government or to a private party who will use the land for a legitimate public purpose. *See, e.g., Kelo*, 545 U.S. at 478. Physical takings involve either the physical occupation or destruction of the property. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

But the government takes private property in less direct ways as well: government regulation may foreclose certain uses of land and thereby diminish its value. When property suffers under the weight of particularly burdensome regulation, the Takings Clause allows a landowner to challenge the government even though it has not physically occupied or destroyed his property. Under this Court's regulatory takings jurisprudence, the government has been required to recompense property owners for the diminution in property value caused by regulation "so unreasonable or onerous as to compel compensation." *Palazzolo*, 533 U.S. at 627; *see also, e.g., Lucas v. S. C. Coastal Council*, 505 U.S. 1003, 1027 (1992) ("Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 833 n.2 (1987) ("Nor are the Nollans' rights altered because they acquired the land well after the Commission had begun to implement its policy. So

long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot."); *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (compensable taking can occur not only when the government seizes or physically intrudes on land, but also when it enacts a "regulation [that] goes too far" in diminishing its value); *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 179 (1872) ("There are numerous authorities to sustain the doctrine that a serious interruption to the common and necessary use of property may be . . . equivalent to the taking of it, and that under the constitutional provisions it is not necessary that the land should be absolutely taken.").

This Court has refused to accept the view that those who purchase property after a regulation is enacted are, in effect, "on notice" and should be ineligible for compensation. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. at 860 (Brennan, J., dissenting). Instead, faced with a claim from a property owner who purchased land already subject to strict California coastal land use laws, the Court held that just as such a regulation could be challenged by owners at the time of implementation, later owners may also challenge it and be compensated. *Id.* at 833 n.2. The Court has made clear that prior owners' full property rights—including the right to challenge an overly burdensome regulation—transfer with title to the property. *Id. See also Palazzolo*, 533 U.S. at 628 ("It would be illogical, and unfair, to bar a regulatory takings claim because of the post-enactment transfer of ownership where the steps necessary to make the claim ripe were not taken, or could not have been taken, by a previous owner.").

In *Palazzolo*, this Court explicitly rejected the rule that appellants like CRV—those who purchased property already subject to a regulation—could *per se* have no investment-backed expectations beyond what was allowed by the regulation, no matter how burdensome. This Court further explained that such a rule:

> would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.

Palazzolo, 533 U.S. at 627.

The Federal Circuit considered this Court's precedent when coming to its decision; indeed it cited *Palazzolo*. *CRV Enters.*, 626 F.3d at 1249 (citing *Palazzolo*, 533 U.S. at 610) ("The Supreme Court has held that a takings claim does not accrue when Congress enacts an overall statutory scheme that authorizes government action; instead the claim ripens when particular restrictions are actually imposed."). The court explained that under *Palazzolo*, CRV's regulatory takings claim ripened with the issuance of the ROD in March 1999, before CRV purchased the property. The Federal Circuit then continued with no additional citations, to the following conclusion:

> As such, the claim was ripe when the ROD was issued in March 1999. CRV did not enter into its option agreement with Dutra until August 2000, and it did not exercise its option to purchase the property until November 2002.

> Because the claim accrued and ripened before plaintiffs acquired the property, plaintiffs cannot state a regulatory takings claim. That claim, if it existed, was owned by the prior owner.
>
> We conclude that plaintiffs did not state a valid physical takings claim, and, to the extent they allege a regulatory takings claim, that claim is barred because plaintiffs did not own a valid property interests at the time of the alleged regulatory taking.

CRV Enters., 626 F.3d at 1250.

This holding—that a post-enactment purchaser does not have standing to challenge a regulation—directly contravenes *Palazzolo*, threatens fundamental rights, and demands reexamination.

B. The Federal Circuit Decision Threatens to Disrupt Real Estate Markets Because Transactions Would Extinguish the Right to a Takings Clause Challenge.

A rule that diminishes property rights as property changes hands could disrupt real estate markets by restricting alienation and interfering with transactions. If one property owner may defend his property against regulations enacted during his ownership, his property value will include the assumption that if an overly burdensome regulation is enacted, he may successfully challenge that enactment and either overturn it or be compensated for the extent to which it diminishes his property value. But the Federal Circuit's rule casts doubt on all of this once he considers selling the property. As a buyer evaluates her potential purchase of the property, she must look at any regulation, no matter

how burdensome, and assume that if she takes title, she cannot challenge it. The loss of standing to challenge diminishes her estimate of the property's value. If the owner has a higher subjective value of the property than any potential buyer could have—the logical result of the Federal Circuit's rule—that mismatch could interfere with the free exchange of real property.

Briefs from *Palazzolo* made these same arguments in 2001. *Amici* for the petitioner in that case explained that small business owners would suffer in a legal regime without *Palazzolo*, but large developers with "high-powered legal counsel" would not, as they "might have arranged for the pre-enactment owner to retain legal ownership of the property and act as a figurehead by applying for all permits under his own name until after the property had been completely developed." Brief for W. Frederick Williams, III, and Louise A. Williams on the Merits in Support of Petitioner at 9, *Palazzolo v. Rhode Island ex rel.*, 533 U.S. 606 (2001) (No. 99-2047). The "post-enactment purchaser" theory would invite litigation over the "form of the transaction, the nature of the transfers, and the effect of partial transfers" in that sophisticated buyers and sellers could circumvent the rule through, for example, acquisition by stock purchase. *Id.* at 10.

Individuals and small companies would not have the resources or expertise to protect their investment and development rights, creating a "massive uncompensated taking" from small developers and investors while leaving open sufficient loopholes for large corporations to avoid any ill effects. *Id.* Such a rule would not only lead to litigation, but would stimulate undesirable growth patterns such as

"sprawl" and "premature" or "leapfrogged development." *Id.* at 15, 19. It would also restrain alienation by giving owners a disincentive to sell: a seller unwilling to secure development rights would have to sell at a "stern discount" to cover the purchaser's loss of rights. *Id.* at 13-14.

An additional *amicus* brief supporting the petitioner in *Palazzolo*—by the Institute for Justice and Professor Richard Epstein—underscores this last point, explaining that the "disregard from the privity rule creates weird incentives that disrupt the sound operation of the real estate market" because if the buyer and seller are aware of the legal situation, "they may postpone an otherwise beneficial transfer in order to protect [the seller's ability to perfect title]," at a social loss presuming the buyer values the land over the seller. Brief of the Institute for Justice as Amicus Curiae in Support of Petitioner at 7 n.2, *Palazzolo v. Rhode Island ex rel.*, 533 U.S. 606 (2001) (No. 99-2047).

Buyers may forgo a socially beneficial transaction for fear that the land will become worthless upon transfer of title. Thus, valuable voluntary transactions will be discouraged by an "unsound rule that against all reason treats a sale from X to Y as though it were a gift of X's takings claim to the state." *Id.* at 8. Such a rule will instead lead to idle and unproductive uses of land. Finally, the Institute for Justice and Prof. Epstein point to what they call a "knowledge problem": the buyer has "the best information on the adverse effects that the regulation has on his proposed plans for development," but this rule allocates the takings claim to the seller and former owner who has "no knowledge of the particulars of the dispute, no ongoing interest in the

property, and who may not even be alive or in the jurisdiction at the time that the dispute ripens." *Id.* at 10. Their brief emphasizes that the rule would disrupt real estate markets and invite a "torrent of lawsuits . . . ." *Id.* at 16.

The negative effects of the decision below on the real estate market and transaction-related litigation could be considerable.

II. THE FEDERAL CIRCUIT MISAPPLIED *PALAZZOLO* AND DEEPENED A CIRCUIT SPLIT

A. The Federal Circuit (Like the Ninth Circuit in Another Case Pending Before this Court) Abrogated *Palazzolo*.

This Court has definitively rejected the rule—sometimes called the "notice rule"—that a successive title-holder is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effects a taking. *Palazzolo*, 533 U.S. at 626; Breemer, J. David & Radford, R.S., *The (Less) Murky Doctrine of Investment-Backed Expectations After* Palazzolo *and* Tahoe-Sierra *and the Lower Courts' Disturbing Insistence on Wallowing in the Pre-*Palazzolo *Muck*, 34 Sw. U. L. Rev. 351, 382 (2005) (recognizing that *Palazzolo* rejected the "notice rule" and confirmed that a purchaser of land acquires all of the rights owned by her predecessor in interest).

This Court explained its holding in *Palazzolo* in sweeping language, which should have left lower courts with no doubt about the state of the law:

> The theory underlying the argument that postenactment purchasers cannot challenge a

> regulation under the Takings Clause seems to run on these lines: Property rights are created by the State. So, the argument goes, by prospective legislation the State can shape and define property rights and reasonable investment-backed expectations, and subsequent owners cannot claim any injury from lost value. After all, they purchased or took title with notice of the limitation.
>
> The State may not put so potent a Hobbesian stick into the Lockean bundle. The right to improve property, of course, is subject to the reasonable exercise of state authority, including the enforcement of valid zoning and land-use restrictions. The Takings Clause, however, in certain circumstances allows a landowner to assert that a particular exercise of the State's regulatory power is so unreasonable or onerous as to compel compensation. . . . Were we to accept the State's rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.

Id. at 627 (internal citations omitted).

Though decidedly more measured, Justice O'Connor wrote separately and also declined to give timing dispositive status:

> Today's holding does not mean that the timing of the regulation's enactment relative to the

> acquisition of title is immaterial to the *Penn Central* analysis. Indeed, it would be just as much error to expunge this consideration from the takings inquiry as it would be to accord it exclusive significance . . . . [I]nterference with investment-backed expectations is one of a number of factors that a court must examine.

Palazzolo, 533 U.S. at 633 (O'Connor, J., concurring).

In *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, the Court reiterated its rejection of a rule under which a post-enactment purchaser's notice of a regulation would be a *per se* bar to his claim:

> More importantly, for reasons set out at some length by Justice O'Connor in her concurring opinion in *Palazzolo v. Rhode Island*, we are persuaded that the better approach to claims that a regulation has effected a temporary taking 'requires careful examination and weighing of all the relevant circumstances.' . . . Justice O'Connor specifically considered the role that the 'temporal relationship between regulatory enactment and title acquisition' should play in the analysis of a takings claim.

Tahoe-Sierra, 535 U.S. at 335-36.

But despite this Court's clarity in *Palazzolo*, the Federal Circuit here—like the Ninth Circuit in *Guggenheim*, 2010 U.S. App. LEXIS 25981—abrogated the rule of that case and announced holdings that more closely resemble the Rhode Island Supreme Court decision that *Palazzolo* overturned. *Palazzolo v. State*, 746 A.2d 707, 716-17 (R.I. 2000) ("[In 1978], there were already regulations in place limiting Palazzolo's ability to fill the wetlands for

development. In light of these regulations, Palazzolo could not reasonably have expected that he could fill the property and develop a seventy-four-lot subdivision . . . Palazzolo's lack of reasonable investment-backed expectations is dispositive in this case.").

Such a decision so significantly limits *Palazzolo*'s reach as to revert back to the pre-*Palazzolo* uncertainty regarding whether a post-enactment purchaser may challenge a regulation burdening his property. Both the *Palazzolo* majority and Justice Sandra Day O'Connor's concurrence were clear that notice of the regulation cannot be sufficient to defeat a takings claim. *See* John A. Kupiec, *Note: Returning to the Principles of "Fairness and Justice": The Role of Investment-Backed Expectations in Total Regulatory Takings Claims*, 49 B.C. L. REV. 865, 886 (2008) (explaining that in *Palazzolo*, the Supreme Court rejected the idea that notice of a regulation can alone be fatal to a takings claim and noting that Justice O'Connor's concurrence suggests that although the Court will not deny compensation solely on notice, it will consider the prior existence of a regulation when conducting the factual inquiry into the regulation's inherent fairness and the plaintiff's expectations); *Palazzolo*, 533 U.S. at 634-36 (O'Connor, J., concurring) ("Investment-backed expectations, though important, are not talismanic under *Penn Central* . . . . Courts properly consider the effect of existing regulations under the rubric of investment-backed expectations in determining whether a compensable taking has occurred. As before, the salience of these facts cannot be reduced to any 'set formula.'"). *Palazzolo* put to rest "once and for all the notion that title to property is altered when it changes hands." James S. Burling, *Private Property*

Rights and the Environment after Palazzolo, 30 B.C. ENVTL. AFF. L. REV. 1 (2002). This Court should not let the Federal Circuit (and the Ninth Circuit) disturb that finality.

B. Other Lower Courts Have Recognized and Applied *Palazzolo*.

In addition to the cases and courts discussed by the Petitioners, at least four other lower court cases from the past decade faithfully applied *Palazzolo*.

The First Circuit positively cited *Palazzolo* in a trade secrets claim for the premise that under *Penn Central*, "whether property is acquired before or after a regulation is enacted does not completely determine the owner's reasonable investment-backed expectations." *Phillip Morris v. Reilly*, 312 F.3d 24, 37 (1st Cir. 2002).

The Seventh Circuit expressed support for *Palazzolo*'s rule in *Abbott Laboratories v. CVS Pharmacy, Inc.*, 290 F.3d 854, 860 (7th Cir. 2002), citing *Palazzolo* for the proposition that "a takings claim survives transfer of the property to a new owner." Indeed in *Abbott Laboratories*, Judge Frank Easterbrook expressed confusion as to why this rule was not self-evident. *Id.*

The Eastern District of Missouri recognized *Palazzolo*'s rule in *Rucci v. City of Eureka*, 231 F. Supp. 2d 954, 957 (E.D. Mo. 2002). The *Rucci* court considered whether a takings claim failed because plaintiff knew of certain city zoning restrictions at the time he contracted to purpose the property. *Id.* The court recited key language from *Palazzolo*, that "acquisition of title to land after the effective date of state restrictions on the use of the land is not fatal to a regulatory takings claim by the new owner." *Id.*

(citing *Palazzolo*, 533 U.S. at 627-28). It thus denied the Defendant's motion for summary judgment and set the case for a jury trial to determine whether the city ordinance amounted to a regulatory taking. *Id.*

The Southern District of Indiana also invoked *Palazzolo*, citing it for the proposition that "legislation restricting the owner's use of the land could still impose a taking of after-acquired property if the restriction is unreasonable." *Martin Marietta Materials, Inc., v. Brainard,* No. 1:06-cv-0825-DFH-TAB, 2007 U.S. Dist. LEXIS 88922, at *38 (S.D. Ind. Nov. 28, 2007).

These cases unambiguously hold that *Palazzolo* forecloses the "post-enactment" theory.

* * *

Although the Federal Circuit cited *Palazzolo*, its decision abrogates that precedent. The same can be said of the Ninth Circuit's decision in *Guggenheim*. In both these recent cases, courts of appeals reached decisions irreconcilable with this Court's jurisprudence and in conflict with other lower courts.

CONCLUSION

This Court should grant *certiorari* to settle the apparent confusion about *Palazzolo* and reaffirm that the Takings Clause does not expire when title to property transfers.

Respectfully submitted,

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